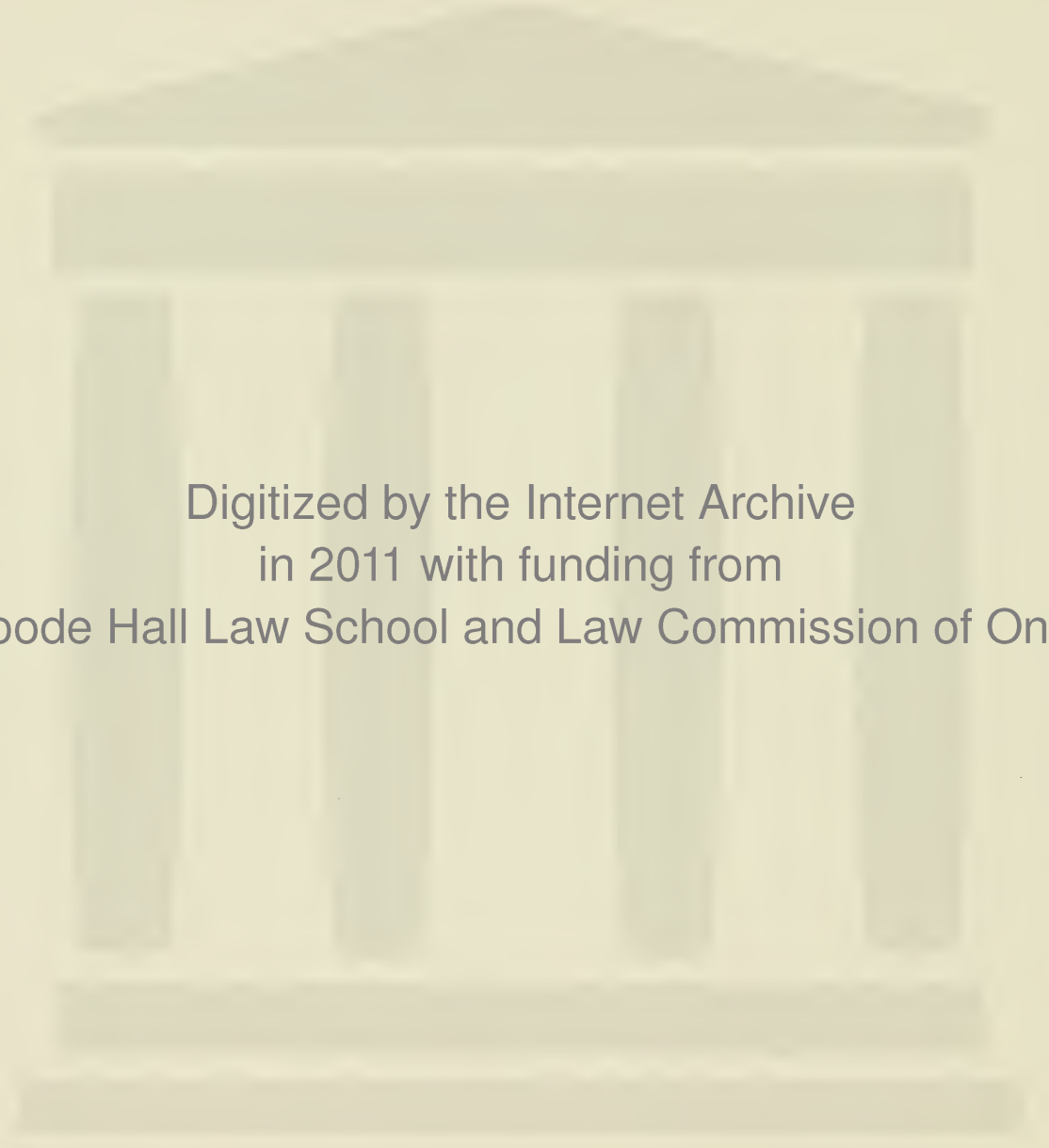
REPORT
ON
TIMESHARING

ONTARIO LAW REFORM COMMISSION

Ministry of the
Attorney
General

1988



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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions. The Commissioners are:

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The Commission wishes to acknowledge the contribution of four former Commissioners: Dr. Derek Mendes da Costa, QC, SJD, LLD, former Chairman of the Commission, Hon. Richard A. Bell, PC, QC, LLD, Mr. William R. Poole, QC, and Mr. Barry A. Percival, QC, whose tenure at the Commission extended through much of this Project.

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Ontario
Law Reform
Commission

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on Timesharing*.

CHAPTER 1

INTRODUCTION

Although lawyers and commentators from the business community may well disagree as to the precise definition of timesharing and the exact details of its proprietary or contractual components, no observers of the phenomenon disagree with the proposition that the creation and sale of timeshare interests is conceptually unique. Not only do timeshare developers attempt to carve units in both space and time out of their real estate projects, but the package in which such units are marketed typically entails a combination of some form of interest in the project with rights of access to a variety of resort or vacation amenities. Accordingly, timesharing cannot be accurately characterized solely as a form of proprietary estate, nor can it be properly described as merely a distinctive way in which to purchase a holiday. Notwithstanding this complexity, or perhaps as a result of these multiple features, the timeshare industry has achieved wide popularity in the United States over the past fifteen years, and has more recently begun making inroads into the Canadian market.

As a policy matter, it would be difficult to argue that further growth of this unique industry ought not to be facilitated. Indeed, there are any number of persuasive arguments pointing to the desirability of regulating the timeshare industry in a way that strengthens its presence in Ontario. In general, the effect of increased timesharing would be to engender growth in the Province's tourism industry by providing capital for resort developments as well as by bringing increased numbers of tourists to the region. Thus, timesharing may be said to embody an economically beneficial influx of capital and a beneficial means of fostering local development. Moreover, regulation of the industry in its ownership, administration, and marketing aspects would provide visible benefits to developers and consumers alike. While consumer protection would obviously involve certain costs for developers, it would also increase consumer confidence in the fledgling industry and thereby encourage the further development of this novel concept.

Whereas timeshare sales have proved popular among Canadian purchasers seeking holiday/ownership packages abroad, the development of timeshare projects within the country to date has remained minimal. Although this may be due in part to any number of economic or commercial factors relating to the Canadian resort industry generally, it is doubtless at least partially reflective of the complex and haphazard legal environment in which domestic timeshare sales take place. As will be seen in the first half of

this Report, developers in Ontario must deal with a somewhat baffling variety of relevant (and partially relevant) statutory provisions governing the marketing of timeshare interests and, in addition, must attempt to make the legal structure of these interests conform to a common law regime of property and contract that is simply not adequate to the task. Thus, if the growth of this facet of the resort industry is to be facilitated, an appropriate step would seem to be the rationalization of the overall regulatory picture.

On the one hand, there will be seen to be a significant need for protective measures in order to ensure that consumers are not only informed of the precise nature of their interest, but are adequately safeguarded against the various contingencies accompanying their purchase. As a corollary, of course, developers may be seen to require the same sort of predictable and protective environment in order to market their projects successfully. Consumer confidence, bolstered by an appropriately tailored regulatory regime, is an essential ingredient to the timeshare undertaking. In every respect, therefore, the timeshare phenomenon would seem to represent a subject matter that not only warrants further study, but that appears to be ripe for substantial, comprehensive legislative intervention and change. The present study therefore culminates with recommendations for a new *Timeshare Act*, applicable to both domestic timeshare projects and foreign projects marketed in Ontario, that includes a combination of enabling provisions aimed at this unique form of property ownership and regulatory provisions aimed at the structure and marketing of timeshare developments and the protection of purchasers' interests.

During the course of this project, the Commission was greatly assisted by an Advisory Board of experts in the field of timesharing, comprising the following persons: Mr. John R. Cockburn, Q.C., Barrister and Solicitor, Barrie, Ontario; Mr. Alan Coleclough, Registrar, Real Estate and Business Brokers Act, Business Practices Division, Ministry of Consumer and Commercial Relations, Province of Ontario, Toronto, Ontario; Mr. Jeremy G. N. Johnston, Barrister and Solicitor, Toronto, Ontario; Mr. Michael D. Lipton, Q.C., Barrister and Solicitor, Toronto, Ontario; Mr. Garth Manning, Q.C., Barrister and Solicitor, Toronto, Ontario; Mr. Bradley N. McLellan, Barrister and Solicitor, Toronto, Ontario; Mr. Allan C. Rose, Q.C., Barrister and Solicitor, Toronto, Ontario; Mr. P. James V. Stevens, Q.C., Barrister and Solicitor, Toronto, Ontario; and Mr. Andrew Zsolt, Inducon Development Corporation, North York, Ontario.

We are most grateful to the members of the Advisory Board and wish to thank them for their participation. We also wish to record our debt to Ms. Ann Merritt, formerly of the Commission's legal staff and now Counsel with the Policy Development Division of the Ministry of the Attorney General, upon whose research this Report is largely based. We thank, in addition, Professor Edward Morgan of the Faculty of Law, University of Toronto, for his assistance in writing the final Report.

CHAPTER 2

GENERAL PROBLEMS WITH TIMESHARING

The underlying problem in respect of the regulation of the timeshare industry is that the very phrase "timeshare" is neither a legal term of art nor a readily definable legal concept. Whereas the expression connotes a now recognized business arrangement, and in non-legal parlance may be said to articulate an "interest in property whereby a number of persons own, or have the exclusive right to use, a piece of property for a specified time period",[1] the notion of timesharing does not fit neatly into any one doctrinal category of property or contract. Accordingly, practitioners in the field have devised a variety of structures, each one of which accomplishes in a slightly different way the basic goal of giving several persons an interest in identical premises but in different slots of time. The conceptual challenge has quite evidently been well met by the legal profession, with the result that the timeshare industry presents a complicated array of proprietary, contractual, and hybrid interests for sale to the public.

Meeting the conceptual challenge by devising various types of timeshare interest is, of course, not simply a triumph of legal characterization and drafting. The various forms of timesharing also represent different methods of resolving the fundamental practical problems to which reference will be made in this chapter.

Perhaps the most significant problem for purchasers arises where the developer becomes insolvent, particularly where the timeshare purchaser has no proprietary right, but only a contractual right, to his particular unit. In either case, the potential loss could be substantial. A further critical problem concerns the management of the timeshare development, since neglect or even inexperience can have severe financial and other consequences for timeshare purchasers.

From the point of view of the protection of timeshare purchasers, there is, as well, a legitimate concern about the aggressive, and often misleading, marketing of timeshare interests to persons who do not have, and are not provided with, sufficient information about what is being offered for sale, and who are not given an adequate period of time within which to assess whatever information is available before becoming contractually bound. Finally, where the purchaser's interest is that of a tenant-in-common with

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[1] Eastman, "Time Share Ownership: A Primer" (1981), 57 N.D. L. Rev. 151, at 152.

other timeshare purchasers of a particular unit, one co-tenant may seek partition and sale of that unit. If successful, and particularly if successful on a large scale, the operation of the timeshare development would be seriously jeopardized, if not entirely frustrated.

In this chapter, we shall examine the critical issues described above. It is impossible to appreciate the complex legal environment in which timesharing exists, and therefore to resolve these serious practical problems confronting the industry, without an understanding of the multiple forms in which proprietary and contractual interests in space and time have been devised. Accordingly, we shall begin our discussion with a cursory survey of these various forms of timeshare interest.

1. THE MULTIPLICITY OF FORMS OF TIMESHARING

The basic division between the various types of timeshare structure is that of fee ownership, on the one hand, and non-fee interests, on the other. Generally, fee ownership carries with it some form of legal title in the property, which can be conveyed, encumbered or mortgaged, or otherwise transferred, and belongs to its owner *ad infinitum*. As one commentator has noted, the purchaser of a fee ownership interest will not only "reap all of the benefits [of such ownership] including the build up of equity, tax benefits, and the right to further encumber it", but she will also "be subject to any and all losses and expenses such as maintenance costs, depreciation in value, and possible liability to those visiting the property".[2] By contrast, purchasers of non-fee timeshare interests acquire no registrable title in real property. Rather, the owner of such an interest merely enjoys a contractual right to use the property of another. Although the period may vary considerably, such interests are theoretically structured so that, upon termination of the agreed period of use, the "purchaser must relinquish the interest and it reverts back to the fee owner of the property".[3]

The following discussion surveys the most typical forms in which timeshare interests are sold. Since the three most significant forms of timeshare fee interests—tenancy-in-common, interval ownership, and fee simple ownership—all represent attempts to accommodate traditional legal devices to a novel type of interest, they tend to present a common, or at least similar, set of problems. The issues that arise in this set of ownership arrangements are those associated with the attempt to make innovative use of inherently inflexible legal categories. The most typical types of right-to-use interests—lease, licence, club membership, and co-operative membership—all represent attempts to substitute contractual rights for proprietary entitlements, and thus may also be seen to raise a set of issues that is common to the entire group. The concerns raised by the latter forms of

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[2] Henze, *The Law and Business of Time-Share Resorts* (1982), §3.01, at 3-2.

[3] *Ibid.*

timeshare interest may be said to centre on the incomplete protection afforded to the holder of a right that falls short of a registrable title. Thus, although in one sense the overall problem is the very multiplicity of forms of timeshare holding, each type of holding or interest may be said to raise its own particular concerns. The most commonplace legal vehicles by which timeshare interests are conveyed will therefore be examined sequentially, so that the peculiarities of each form can be better brought to light.

(a) Fee Ownership Interests

(i) Tenancy-In-Common, or Time Span, Ownership

Certainly the most popular form of fee ownership of timeshare units is that of tenancy-in-common or time span ownership.[4] Such an arrangement combines the traditional conveyance of a tenancy-in-common interest with a series of restrictive covenants, so that the purchasers receive two distinct types of legal interest. These include the usual undivided ownership in real property that defines the tenancy-in-common, as well as an exclusive contractual right to use the property for a specified period of time.[5] Accordingly, notwithstanding the time span arrangement, all the purchasers of the unit take joint title in fee simple absolute.

As is evident, without the timeshare agreement each of the tenants-in-common would be entitled to possession of the timeshare unit at all times.[6] Under ordinary circumstances, tenancy-in-common is conceived as a concurrent interest in which there is a unity of possession despite the separate titles of each co-tenant. Accordingly, it is necessary for each of the co-tenants to delineate with the others by contract the specified periods of occupancy. Such an agreement is then of necessity appended to the title in the form of a restrictive covenant, since successors and assigns of the present owners must also be similarly restricted in their rights.

From a marketing point of view, there are both advantages and disadvantages to time span arrangements. The very fact of ownership, of course, is attractive to purchasers, and therefore is viewed positively by the developer from the standpoint of sales.[7] Since such fee interests are clearly registrable as any other tenancy-in-common, there is somewhat less market resistance to what is otherwise a novel form of property holding. Moreover, the fact that one is dealing with a recognizable property interest is helpful in

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[4] *Ibid.*, §3.03[2][a], at 3-14.

[5] Ingersoll, "The Legal Forms of Timesharing", in Bloch, Ingersoll, and Madsen (eds.), *Timesharing II* (Urban Land Institute, 1982) (hereinafter referred to as "*Timesharing II*") 15.

[6] Dubord, "Time-Share Condominiums: Property's Fourth Dimension" (1980), 32 Maine L. Rev. 181, at 186.

[7] Schiefelbein (ed.), *The Time Sharing Encyclopedia* (1979), Vol. 3, at A-4.

overcoming some of the potential legal problems. Registration itself is highly beneficial with respect to such concerns as insolvency of the developer and notice to third parties. Additionally, ownership in the form of a tenancy-in-common is more clearly outside the scope of securities legislation, thus avoiding the costs entailed in the marketing of securities.[8]

There are several legal concerns with the time span form of ownership, all of which flow from the attempt to utilize the tenancy-in-common relationship in a way that varies significantly from its original conception. Thus, for example, problems may well arise with the financing of this type of unit. Such financing generally involves the securing of a mortgage on the entire unit, with the timeshare owners participating on a *pro rata* basis in its payment.[9] In the event of default of one of the co-owners, the other tenants-in-common would be forced to cover the deficiency left by the default in order not to risk a foreclosure action on the unit. Of course, it is possible that in the timeshare agreement itself there may be provisions that, if one timeshare owner should default in the payment of any expenses, a lien shall arise against only her specific timeshare interest; and given that the agreement would be appended to the title in the form of a series of restrictive covenants, such an arrangement would be integrated into the arrangement with any mortgagee. However, this represents a significant dilution of the mortgagee's potential remedies, and would doubtless make financing of such units either more costly or difficult to obtain.

An additional difficulty arises by virtue of the doctrine holding tenants-in-common jointly and severally liable for any injuries suffered by a third party on the premises. Similarly, where the timeshare development is in the form of a condominium,[10] most timeshare arrangements envision the various owners of a single unit as dealing as one with the other units that make up the condominium corporation.[11] Thus, if one of the time span owners negligently damages the unit, expenses for its repair may well be assessed by the corporation against all of the other tenants-in-common. Once again, contractual arrangements can be made so that the cost of repairs necessitated by the negligent behaviour of one timeshare owner will be borne by that individual alone. However, in situations where occupancy changes every week or every several weeks, a determination of such negligence and the allocation of individual responsibility becomes a rather cumbersome process. It would seem that the common practice is to appoint the managing agent of the entire project as the sole functionary with the authority to determine negligence as between timeshare co-owners, thus avoiding resort to judicial process[12] and allowing for a more efficient

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[8] See the discussion of the impact of the *Securities Act*, R.S.O. 1980, c. 466, *infra*, ch. 3, sec. 1(a).

[9] See Schiefelbein, *supra*, note 7, at A-4.

[10] See discussion *infra*, ch. 3, sec. 2.

[11] *Ibid.*, sec. 2(a).

[12] Engle, "Legal Challenges to Time Sharing Ownership" (1980), 45 Mo. L. Rev. 423, at 439.

relationship not only between the tenants-in-common of individual units but between each of the units of the condominium.

In the United States, a disadvantage of the tenancy-in-common form of timeshare ownership has become evident with respect to the detrimental effect of a federal income tax lien. Under federal law, if one of the co-owners defaults on payment of federal income tax, the government is empowered to file a tax lien against the timeshare unit. In such an eventuality, the government, as lien holder, is entitled in law to foreclose on the entire property, and not merely the interest of the defaulting co-owner, in order to satisfy its claim.[13] In the timeshare context, the foreclosure and sale of the entire property—that is, the interests of all co-owners of the particular unit—would have the effect of defeating the timeshare arrangement in respect of that unit.

It would appear, however, that a similar problem would not arise in Canada.[14] Whether the federal Crown attempts to recover unpaid income tax in the Federal Court or "any other court of competent jurisdiction",[15] it would appear that the ordinary law of execution against realty would apply. In Ontario, at least, it seems clear that a creditor enforcing a money judgment or order against a debtor's exigible assets would ultimately be entitled to sell only the precise interest of the debtor in those assets.[16] Consequently, in the timeshare context, neither the Crown nor any other creditor would be entitled to sell the entire property—that is, the interests of all tenants-in-common in a particular unit—in order to recover the outstanding debt against but one co-owner. Since, therefore, the sale would be of the defaulting co-owner's interest alone, the interests of the other co-owners of the unit would remain unimpaired.

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[13] *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132 (1983). See, also, Engle, *supra*, note 12, at 428-31.

[14] All taxes due to the Crown are "debts...recoverable as such in the Federal Court of Canada or any other court of competent jurisdiction": *Income Tax Act*, R.S.C. 1952, c. 148, as substantially re-enacted by S.C. 1970-71-72, c. 63 (statutory references are to the sections of the 1970-71-72 statute, as amended), s. 222. With respect to enforcement in the Federal Court, any amount that has not been paid under the Act may be "certified" by the Minister of National Revenue (*ibid.*, s. 223(1)) and the certificate may be registered in the Federal Court. When registered, the certificate "has the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court" for a debt: *ibid.*, s. 223(2). Under s. 56(1) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2d Supp.), the Federal Court may issue process against the property of a debtor "of the same tenor and effect" as may be issued out of a provincial superior court. More specifically, the Federal Court rules and procedure for binding and executing against real property are, unless otherwise provided, the same as those applicable in provincial superior courts: *ibid.*, s. 56(3).

[15] *Income Tax Act*, *supra*, note 14, s. 222.

[16] Concerning the seizure and sale of interests in land, see, generally, Gertner, Springman, McGuinness, Morrison, Stewart, and Laskin, *Debtor and Creditor* [:] *Cases and Commentary* (3d ed., 1987), at 255 *et seq.*, and Dunlop, *Creditor-Debtor Law in Canada* (1981), at 169 *et seq.* and 404 *et seq.*

Finally, although the problematic implications for timeshare ownership contained in the *Partition Act*[17] will be discussed separately in this Report, it should be indicated at this point that the possibility of a partition action by one co-tenant represents a serious concern with respect to tenancy-in-common timeshare ownership. At common law and under the *Partition Act*, any co-tenant may bring a court application seeking the physical division of the property and, if successful, each tenant-in-common would receive title in fee simple to her particular proportional share of the property. Quite obviously, this is a highly problematic proposition in the context of time span arrangements. Generally, if physical division of the property is deemed by the court not to be feasible, the partition action results in a court-ordered sale of the property and division of the proceeds among the co-owners. Accordingly, most commentators agree that "[t]he elimination of the co-owners' right to compel judicial partition is crucial to the preservation of tenancy in common time-share schemes".[18] In the absence of an enforceable waiver of the right to compel partition, mere ownership of a concurrent estate would suffice in order for a dissatisfied co-owner to force partition and, ultimately, sale of the unit.

As can be seen, then, from the preceding discussion, the inherent doctrinal rigidity of property law concepts such as tenancy-in-common gives rise not only to a host of drafting difficulties for the solicitor structuring the arrangement but, when utilized in an innovative way, creates an assortment of complexities requiring regulatory change.

(ii) Interval Ownership

Perhaps the most creative use of proprietary estates in the context of timeshare developments is that involved in the concept of interval ownership. In this type of arrangement, purchasers of timeshare interests receive two distinct vested interests in the property, both of which are created simultaneously in the deed.[19] First of all, the purchaser acquires an estate for years, which is then coupled with a remainder by tenancy-in-common, thus converting the non-freehold estate into a fee interest. The estate for years takes the form of a revolving recurring estate, ordinarily structured as a number of future estates for years and entitling the holder to possess the premises during the period specified.[20] The "recurring estates for years" are usually designed to end at the expiration of the useful life of the building.[21]

As indicated, the estate for years becomes a freehold estate only when it is coupled with a remainder interest in the fee. Thus, upon termination of

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[17] R.S.O. 1980, c. 369.

[18] Dubord, *supra*, note 6, at 189.

[19] Ingersoll, *supra*, note 5, at 16.

[20] Dubord, *supra*, note 6, at 201.

[21] *Ibid.*, at 201, *n.* 135, and Ingersoll, *supra*, note 5, at 16.

the recurring estate for years, the timeshare purchaser automatically becomes entitled to the second interest contained in the original deed. This second interest takes the form of a vested remainder as tenant-in-common with the other interval owners. At this stage, the several co-owners may opt to revive the interval ownership arrangement, either contractually or through the creation of a new series of future estates for years. Alternatively, they may continue as tenants-in-common, or sell the property and distribute the proceeds.[22]

Despite its apparently convoluted structure, this form of timesharing is designed to avoid several of the problematic aspects of tenancy-in-common ownership. By way of illustration, each timeshare period in an interval ownership unit is owned separately and exclusively of the other periods during the term of the estate for years. Thus, the owners of such estates would not be subject to the burden of joint liability for an injury occurring within the unit as a result of the negligence of one of the owners. Similarly, the tax lien problems encountered in the United States with respect to tenancy-in-common timeshare units would doubtless be avoided through the creation of separate estates for years.[23]

It should be noted, however, that the situation with respect to an application for partition of property held under an interval ownership structure is not quite so straightforward. Indeed, it would seem that the possibility of partition does arise, although its impact is not quite so serious as in a tenancy-in-common timesharing scheme. In the interval ownership arrangement, each owner holds a fee simple in common with the other co-owners, thus giving rise to a right to partition notwithstanding the fact that, in every case, the fee is held subject to a term for years. The conveyance of the remainder interests ensures that each of the interval purchasers holds a present fee simple in tenancy-in-common, so that in the long run the situation is the same as any other tenancy-in-common arrangement. However, in the case of interval ownership, the successful partition of the fee simple estate would not affect the interval owners' rights to possession during the term of the estates for years.[24] Thus, the physical partition or sale of the unit would come after the useful life of the property has passed. This, of course, is true of all of the advantages of interval ownership over tenancy-in-common, since upon taking possession of the remainder interest any difference between interval ownership and tenancy-in-common by definition disappears. As one commentator has noted, this may not represent a serious problem, since the remainder interest is itself "merely an incidental part of the total ownership", and at the end of the estates for years "[t]he most logical disposition of the property...is a sale and distribution of the proceeds among the owners".[25]

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[22] *Ibid.*

[23] Engle, *supra*, note 12, at 428.

[24] Dubord, *supra*, note 6, at 210.

[25] Schiefelbein, *supra*, note 7, at A-2.

Despite some of the relative advantages of interval ownership over tenancy-in-common, observers of the timeshare industry note that interval ownership is no longer a widely utilized form.[26] One reason for this may be that a combination of two estates in a single deed represents a particularly complex form of conveyance and lacks the familiarity necessary for effective marketing. In addition, financing for such an ownership structure is often difficult to acquire, for the same reason that difficulties would be confronted with tenancy-in-common units if a mortgagee's rights were restricted to a lien against the interest of a particular defaulting co-owner rather than foreclosure on the entire unit.

Another significant legal obstacle to interval ownership structures arises out of the common law doctrine of merger. The operation of this doctrine has been described succinctly as follows:[27]

> The term *merger* means that, where a lesser and a greater estate in the same land come together and vest, without any intermediate estate, in the same person and in the same right, the lesser is immediately annihilated by operation of law. It is said to be 'merged', i.e. sunk or drowned, in the greater estate.

This description is particularly applicable to the concept of interval ownership, since the remainder in tenancy-in-common is not only vested in the same person as the recurring estate for years, but is clearly a greater estate than the estate for years. As such, if the common law were permitted to operate, the doctrine of merger would have the result of extinguishing the lesser estate for years. The effect would be destructive of the entire interval ownership concept, as it is the estate for years, rather than the surviving remainder interest, that establishes the timeshare purchasers' rights of possession.[28]

In Ontario, the common law doctrine of merger has been modified by section 36(1) of the *Conveyancing and Law of Property Act*,[29] which provides as follows:

> 36.—(1) There shall not be any merger by operation of law only of any estate, the beneficial interest in which, prior to *The Ontario Judicature Act, 1881*, would not have been deemed merged or extinguished in equity.

It would seem, therefore, that the doctrine of merger operates in Ontario in accordance with equity rather than common law, thus necessitating an inquiry into the ways in which equity may intervene to prevent the application of the doctrine in every case where it would otherwise serve to merge a

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[26] Ingersoll, *supra*, note 5, at 16.

[27] See Burn (ed.), *Cheshire and Burn's Modern Law of Real Property* (13th ed., 1982) (hereinafter referred to as "Cheshire and Burn"), at 851 (emphasis in original).

[28] See Dubord, *supra*, note 6, at 207-08.

[29] R.S.O. 1980, c. 90.

lesser estate into a greater one. Briefly, the courts of equity appear to have established a more flexible approach to merger than that of the common law courts, focusing on the intentions of the parties to the conveyance. That is, if it were made clear in the deed that the parties intended that the lesser estate should remain intact, equity would intervene to prevent the common law doctrine from operating.[30] Moreover, "even in the absence of such an expressed declaration Equity will presume an intention against merger if it is clearly advantageous to the person in whom the estates are united...that the lesser interest shall not be destroyed".[31] Thus, it would seem that, in Ontario, an interval ownership type of timeshare interest may be conveyed without a serious risk of merging the lesser estate for years into the greater estate in remainder. The safest route in this regard would be to insert in the deed itself a clause to the effect that the parties intend that the doctrine of merger should not apply. The structure of the interval ownership concept, however, makes it clear that it is more advantageous to the timeshare purchaser that the estate for years and the remainder interests not merge, and, as such, equitable protection from the automatic operation of common law can be expected.

As already indicated, interval ownership has become a relatively unpopular form of timeshare holding. The complexities of conveyance and the difficulties in financing such structures have combined to decrease the marketability of this type of ownership interest. In addition, the fact that many of the legal problems associated with tenancy-in-common arrangements re-emerge at the end of the interval ownership period has dampened enthusiasm for this otherwise innovative conveyancing technique. Nevertheless, the interval ownership structure stands not only as a representation of creative lawyering, but as documentary evidence of the difficulty in grappling with timesharing in a common law regime that is unaccommodating to the very concept. In this sense, it serves to highlight the desirability of legislative intervention in the form of enabling provisions as a precursor to a comprehensive regulatory package.

(iii) Fee Simple Ownership

Perhaps the most straightforward manner in which to convey timeshare ownership is to create an interest in fee simple absolute in each purchaser. Under this type of arrangement, a conventional condominium is established, and the developer conveys to each purchaser the title to his physical unit and possessory period. Thus, the particular time of use allocated to each owner "is treated as a conveyable interest and is as much a part of the property description as the traditional legal description of width, depth, and height measurements".[32]

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[30] Cheshire and Burn, *supra*, note 27, at 852.

[31] *Ibid.*

[32] Ingersoll, *supra*, note 5, at 17.

As with all fee simple owners, the title holder under such an arrangement is the absolute owner of the property for the devised possessory period, and will never be considered to own the conveyed property jointly with the other fee simple title holders. Thus, no supplementary agreement or separate estate is required in order to establish the timeshare interests, since the temporal dimension to the description of the property builds directly into each purchaser's title the arrangement sought by tenancy-in-common and interval ownership developments. There is no need to supplement indirectly the title conveyed, since the timeshare arrangement appears as an integral part of the fee simple estate.[33] So long as the courts will recognize and enforce the temporal, along with the physical, facets of ownership (an as yet untested proposition), the fee simple form achieves directly what all of the other proprietary schemes attempt to achieve indirectly.

As each purchaser is the sole owner of her timeshare interest, all of the problems that have been seen to arise in the context of joint ownership are alleviated. Joint tort and tax liability is avoided, as are the problems associated with a group relationship with mortgagees and other creditors. Similarly, the complexity of other forms of ownership is eliminated, making for a highly marketable presentation of absolute ownership to the consumer.

As is evident, the fact that there is no co-tenancy also serves to eliminate the possibility of an application for partition. Ironically, this apparently attractive feature also constitutes one of the primary disadvantages of fee simple timeshare ownership. That is, the ownership of possessory periods continues indefinitely into the future, quite possibly outlasting the usefulness of the building as a resort property. By this time, of course, the timeshare arrangement itself is both cumbersome and intrinsically useless, and at best will add time and cost to the endeavour to sell off the property as a single unit. Obviously, reconversion to a traditional condominium will be impossible if the consent of each holder of a fee simple interest cannot be obtained. In this sense, therefore, the fact that an application for partition at the end of the project's useful life is not available, as it would be in an interval or tenancy-in-common ownership arrangement, becomes a double-edged sword. While the absence of the partition possibility serves to facilitate the timeshare arrangement where it is worthwhile for interval possession to continue, the availability of partition and a court-ordered sale of the property would certainly serve to overcome any obstacles to an efficient termination of the timeshare arrangement.[34] One can imagine the difficulties involved in having fifty-two fee simple owners of one-week possessory periods in a given condominium unit that, although now useless as a resort, has retained value as a residential property. If any one of the owners refuses to convey his fee, the other fifty-one owners will have the marketability pulled out from under their proprietary title.

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[33] Dubord, *supra*, note 6, at 213.

[34] *Ibid.*, at 214-15.

It is clear, therefore, that ownership of a timeshare interest in fee simple represents the best and the worst of all of the ownership possibilities. Although as a conveyancing technique it is neat and clean, its recognition by the courts as a valid estate in a four dimensional property is still somewhat questionable. Even if the interest is recognized, however, the very notion that a fee simple in perpetuity is the structure on which an arrangement, not intended to last indefinitely, is built, is problematic. It gives rise to a situation in which full co-operation between fee simple owners is necessitated, without which purchasers may be left with an unproductive, inefficient, and unmarketable property holding. Thus, although at first blush fee simple ownership appears ideal, intrinsic problems may be seen, at the very least, to counterbalance its benefits.

(b) Right-To-Use Interests

As none of the fee ownership methods of structuring timeshare interests can be said to be ideal, developers have resorted to a number of contractual or quasi-contractual arrangements in which the purchaser of a timeshare unit acquires something less than legal title to the real property. Indeed, it seems that right-to-use interests have become a more popular way to approach the timeshare problem than fee ownership. One observer of the relevant market notes that "of the millions of dollars in timesharing sales, right-to-use programs today probably account for more than half of the total sales dollars and ultimately will probably account for more than three-quarters of the total sales dollars in North America".[35]

Generally, right-to-use arrangements entail a purchaser contracting to use someone else's property, so that title to the actual property unit remains with either the developer, a club, or a corporation that is in turn owned by the holders of a right-to-use. As with fee ownership structures, there are both advantages and disadvantages to such non-ownership forms of timeshare interest. For example, a right-to-use relieves the purchaser of having to pay directly for such matters as property taxes and continuing upkeep.[36] In addition, where the developer retains the fee interest in the property for herself, there is a built-in incentive to protect the investment and therefore to maintain the property in a state of good repair. Of course, unlike an actual title holder, a right-to-use purchaser will not necessarily have control over the management of the property, although managerial arrangements can be made in any number of ways and can be drafted directly into the contract that contains the timeshare interest. However, from the purchaser's point of view, the most highly problematic aspect of right-to-use interests is that, where the developer retains title to the units, the timeshare owners have no control over, and are especially vulnerable to, any dealings that the developer may have with regard to the title to the property subsequent to selling

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[35] Nighswonger, "Timesharing Marketing", in *Timesharing II*, *supra*, note 5, 51, at 52.

[36] See Henze, *supra*, note 2, §3.02[2], at 3-4.

off the timeshare interests. Such dealings, which range from those resulting from the developer's insolvency, to be discussed in a later section,[37] to an encumbrance or sale of the property, call for special measures, such as "non-disturbance clauses", to be inserted into the timeshare contract and to be appended to or registered on title.[38]

As will be evident, the developer reaps several advantages from the marketing of right-to-use rather than ownership interests, not the least of which is the ability to retain the underlying title in the property. In this way, the developer realizes any appreciation in the value of the property, and is in no way obliged to pass on such gain to the timeshare owners. Similarly, retention of title enables the developer to utilize the equity in the property to finance other projects, provided, of course, that the right-to-use agreements with the timeshare owners permit such activity. Finally, non-ownership forms of timeshare interests are more readily placed on the market, since they need not conform to the legal regulation of real estate sales and, in particular, need not be marketed through licensed real estate sales personnel.[39]

The one significant disadvantage of right-to-use interests to the developer is that, while such interests escape being identified as interests in real property, they might well be classified as securities. This possibility will be discussed in far greater detail at a later point in this Report.[40] For the moment, suffice it to say that, should a right-to-use interest qualify as a security under relevant legislation, marketing would be subject to extremely complex and costly registration requirements, to say nothing of the expensive prospectus and disclosure rules to which any such sale of timeshare securities would have to conform.

Given the popularity of the non-ownership forms of timesharing, and the various complexities entailed in each of the right-to-use arrangements, it would seem appropriate to canvass in more detail the four standard types of interest. The goal is not so much to achieve an exhaustive investigation of contractual intricacies, but rather to highlight some of the problem areas in order to clarify both the efficacy of the common law environment and the voids to be filled by legislative reform.

(i) Lease Arrangements

The first of the non-fee ownership arrangements to be considered falls squarely between the law of property and the law of contract. A timeshare

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[37] *Infra*, this ch., sec. 2.

[38] Ingersoll, "Introduction, Glossary of Terms, and Checklist of Federal Regulatory Concerns for Timesharing", in Ingersoll (ed.), *The Legal Aspects of Real Estate Timesharing* (Practising Law Institute, 1982) 11, at 19.

[39] Henze, *supra*, note 2, §3.02[2], at 3-3. For the position in Ontario, see *infra*, ch. 3, sec. 3(b)(i).

[40] *Infra*, ch. 3, sec. 1.

lease has been described as "a prepaid lease arrangement under which the purchaser has the right to occupy a particular type of unit for a specified time period each year over a designated number of years".[41] As with any lessee, the purchaser of such a timeshare interest does not receive fee ownership and, upon the expiration of the lease, the timeshare owner's estate terminates and possessory rights to the property revert to the fee simple owner.

From a practical point of view, leasing is a relatively simple procedure to administer, since the only documentation that is required is the lease itself, which, of course, should include all of the various rules governing the operation of the timeshare development.

The question whether the lessor-lessee relationship is a matter of property or contract has been the subject of some judicial debate over the years. In *Goldhar v. Universal Sections and Mouldings Ltd.*,[42] the Ontario Court of Appeal held that rent issues from the estate in the demised premises rather than from a meeting of the parties' minds as in contract, so that, upon the tenants' abandoning the premises, rental payments continue to be owed over the unexpired term of the lease. More recently, however, in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*,[43] the Supreme Court of Canada found the agreement to lease to be contractual in nature, such that, upon the tenant's breach, a duty to mitigate damages arises in the landlord. In the timeshare context, these particular issues do not arise since the entire lease is prepaid by the purchaser. However, the theoretical distinction between an interest in property and a right in contract remains highly relevant to a number of issues of concern to the timeshare purchaser.

Characterization of the interest in the lease as an estate in property rather than a mere contractual right brings the sale of such a timeshare interest within the scope of the laws governing the sale of real estate.[44] Most significantly, a lease, unlike a purely contractual right, may be registered on title, thus providing notice of the leasehold interest to all purchasers of the fee and, where necessary to do so, effectively safeguarding by registration the lessee's right to use the property for the term of the lease in the event of a forced sale. Accordingly, in order to protect a lessee of *Registry Act*[45] land

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[41] Ingersoll, *supra*, note 5, at 19.

[42] [1963] 1 O.R. 189, (1962), 36 D.L.R. (2d) 450 (C.A.).

[43] [1971] S.C.R. 562, 17 D.L.R. (3d) 710. See, also, s. 3 of the *Landlord and Tenant Act*, R.S.O. 1980, c. 232, which provides, among other things, that the "relation of landlord and tenant does not depend on tenure, and a reversion in the lessor is not necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation...". For a brief discussion of s. 3, as well as the *Highway Properties Ltd.* case, see Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976), at 5-6.

[44] For example, in Ontario, domestic timeshare lease arrangements are subject to the *Real Estate and Business Brokers Act*, R.S.O. 1980, c. 431. See *infra*, ch. 3, sec. 3(b)(i).

[45] R.S.O. 1980, c. 445, s. 65.

where the term runs for more than seven years, and a lessee of *Land Titles Act*[46] land where the period yet to run is in excess of three years, the lease must be registered on title. These provisions, although falling short of defining the leasehold as a full proprietary rather than contractual right, do much to strengthen the protection afforded the purchaser of a timeshare interest based on the right to use the premises rather than on any actual fee ownership.

(ii) Licence Arrangements

In an effort to avoid the necessity of compliance with assorted real estate regulation and licensing legislation, developers very early in the history of the timeshare industry began redrafting leases in the form of licence arrangements. Such documents, which are explicitly stated to be contractual in nature, provide purchasers with a "licence" to use a timeshare unit annually for a certain period of time and for a designated number of years.[47] The precise unit, as well as the identification of the particular possessory period, may be either specified or unspecified in the written agreement. Thus, with the exception of the possibility of leaving the unit and time period unspecified, the documentation used to convey a timeshare licence is quite similar to that employed in structuring a timeshare lease.

Notwithstanding the similarities, the point of the label "licence" instead of "lease" is to differentiate the former contractual interest from the latter's connotation as an estate in real property.[48] As one commentator has noted, however, whatever advantages may be seen to exist in making such a distinction can be reaped "only if various regulatory bodies concur with the developer that a licence does not in fact purport to convey an interest in real property".[49] In the United States, the application of the property-contract distinction varies from state to state. Whichever way one draws the line, it is an exceedingly fine one, and would seem to reflect a policy decision of the jurisdiction rather than an articulation of common law principle. The situation may be summarized as follows:[50]

> As with other right-to-use forms, vacation licenses are generally not considered interests in real property although several states' laws regulate right-to-use as real property. Some legal authorities distinguish a true license from an easement. Although the differences are subtle, a true license grants only *permission* to use the property, whereas an easement grants the *right* to use the property. For this reason, some practitioners believe that many right-to-use timeshare interests could more properly be categorized as easements and, therefore, interests in real property.

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[46] R.S.O. 1980, c. 230, s. 47(1)4.

[47] Ingersoll, *supra*, note 5, at 19.

[48] Weixelman, "Time-Sharing: The Need for Legislation" (1982), 50 U.M.K.C.L. Rev. 302, at 306.

[49] Schiefelbein, *supra*, note 7, at A-6.

[50] Ingersoll, *supra*, note 5, at 20 (emphasis in original).

The law in Ontario would appear to be in something of a state of flux. Any number of factors may be taken into account in construing the question of licence or lease including, most significantly, the intention of the parties as evidenced by the words of the actual agreement.[51] As with other such distinctions, however, the explicit characterization is not considered to be determinative. In other words, a timeshare developer and its purchasers cannot convert a landlord-tenant relationship into one of licensor-licensee by simply using one label instead of the other.[52] Additionally, the courts seem to weigh as a factor the degree of exclusivity of possession of the premises that the purchaser acquired.[53] Exclusive possession has traditionally been deemed to be a condition precedent to the relationship of landlord and tenant, although its existence does not necessarily indicate that the interest being conveyed is in the nature of a leasehold.[54] Thus, all of the factors surrounding the arrangement will be examined in an effort to discern whether the proper characterization of the interest conveyed is that of a proprietary or contractual right.

Timeshare licence arrangements, although somewhat advantageous to the developer, carry with them certain disadvantages to the purchaser. The very fact that the interest is not perceived to be an estate in land now prevents its registration on title. Accordingly, some alternative arrangement must be made in order for a purchaser's interest to remain protected in the event of a foreclosure action by the developer's creditors or some other forced sale of the property. Additionally, a licence contract is far more likely to carry with it stipulations that the licensee is not permitted to rent, sublicense, sell or otherwise assign the interest in the licence.[55] The reason for this is that, unlike a lease, a licence is highly susceptible to classification as a security under regulatory legislation, which susceptibility is reduced by the developer's ensuring that a secondary market in the licences does not emerge.[56]

(iii) Club Membership Arrangements

Timeshare club memberships have been identified by commentators as the only form of timesharing that clearly does not convey an interest in land

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[51] *Re B.A. Oil Co. and Halpert*, [1960] O.R. 71, (1959), 21 D.L.R. (2d) 110 (C.A.).

[52] See Rhodes (ed.), *Williams & Rhodes*[:] *Canadian Law of Landord and Tenant* (5th ed., 1983), Vol. 1, §1:2:1, at 1-16, citing *Lippman v. Lee Yick*, [1953] O.R. 514, [1953] 3 D.L.R. 527 (H.C.J.), and *Errington v. Errington and Woods*, [1952] 1 K.B. 290, [1952] 1 All E.R. 149 (C.A.).

[53] *Maple Leaf Services v. Townships of Esso and Petawawa*, [1963] 1 O.R. 475, 37 D.L.R. (2d) 657 (C.A.).

[54] See, generally, Rhodes, *supra*, note 52, §§1:1:5 and 1:2:1, at 1-5 and 1-14.

[55] Weixelman, *supra*, note 48, at 307.

[56] For a discussion of the regulation of timeshares as securities, see *infra*, this ch., sec. 1(b)(iv), and, in more detail, ch. 3, sec. 1.

to the purchaser.[57] Under this type of arrangement, a non-profit corporation (the club) is created, which then either purchases or leases the units designated as timeshare units from the developer so that they are available for the use of the club members. A purchaser therefore buys a membership in the club rather than any interest in the property. Depending on the club rules, membership entitles the purchaser to use either a specified or a non-specified timeshare unit for a certain period of time (either fixed or floating) for a designated number of years.[58] Generally, the length of membership is equal to or less than the useful life of the resort development, so that the memberships can either be renewed or the entire facility converted into another type of vacation property. It has been pointed out that the club membership form of timesharing is appropriate with respect to properties that are more akin to hotel or motel facilities and that, as a consequence, are not easily converted into residential condominiums.[59]

The original structuring of a club membership timeshare interest is obviously somewhat more complicated than either lease or licensing arrangements. By-laws and articles of incorporation of the newly created club corporation must be drafted, setting out the rights and obligations of the club members. Within such by-laws would be the specific right of the members to use the timeshare unit during their own possessory periods, as well as maintenance arrangements and provisions with regard to the recreational facilities of the development. In addition, the lease or conveyance to the club of the timeshare property must be drafted, as must membership certificates and some type of literature informing prospective club members of the various rights and duties that are incidental to club membership.[60] The need for this type of information is more acute with respect to club memberships than it is with other types of fee ownership or right-to-use interests since, unlike a lease, licence, or proprietary entitlement, the notion of a club membership does not on its own connote any specific terms. Purchasers are therefore unaware whether their participation in the development is in the nature of a recurring timeshare interest or membership in a more traditional resort country club.

Since club memberships most certainly do not create property interests in the purchasers, the disadvantages of non-registration on title, discussed above, are applicable. Similarly, the concurrent advantages and disadvantages of the fact that such interests are not subject to regulation under real estate legislation must be taken into account. While the disadvantages from the purchasers' point of view are obvious, the impact of non-regulation on the developer is, although not always immediately apparent, at best a mixed blessing. By way of illustration, although the ability to market the units by means of unlicensed sales personnel may represent an initial advantage to

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[57] Ingersoll, *supra*, note 5, at 20.

[58] One variation is described in Henze, *supra*, note 2, §3.02[6][a], at 3-10.

[59] Schiefelbein, *supra*, note 7, at A-9.

[60] Henze, *supra*, note 2, §3.02[6][b], at 3-11.

the developer or the club corporation, the very factor that allows such freedom—that is, the non-proprietary nature of the interest—may increase the possibility that the club memberships will be classified as securities. Given the substantial cost burden entailed in securities regulation, club memberships have been carefully structured in order to avoid such classification.[61] Much like licence arrangements, club by-laws typically are drafted so as to prevent the emergence of a secondary market in membership resales.

(iv) Co-operative Arrangements

The most recent innovation in the ongoing process of structuring timeshare interests is that of the timeshare co-operative. As with a more typical residential real estate co-operative, title to the entire property is in a corporate entity. Each purchaser acquires a timeshare interest by purchasing shares in the corporation; thus, the purchaser has no interest in the real property itself.

Purchasers of an interest in a timeshare co-operative acquire a certain percentage of ownership, which may be tailored to correspond to the length of their particular possessory period and the desirability of the time of year in which their period falls.[62] Specific possessory periods are then allocated to the purchasers by way of a lease from the corporation. Such leases not only create the interval calendar setting out the shareholders' rights of occupancy, but, as in residential co-operative buildings, "mandate maintenance charges, delineate common areas, establish services provided to owners, and in general, fix the rights and obligations of the...co-op owner".[63]

As is evident, the co-operative structure is highly flexible, and can be adapted to accommodate any number of interval possessory arrangements. Moreover, the fact that co-operative ownership is relatively commonplace, and certainly already familiar in the non-timeshare real estate market, has served to enhance the marketability, and to facilitate the financing, of timeshare developments structured in this way.

However, one problematic aspect of co-operative ownership from the purchasers' point of view is that mortgage financing is generally secured by the corporation for the entire development. Each timeshare owner-shareholder contributes toward the overall mortgage not on an individual basis, but rather as a member of the co-operative. Thus, where one such timeshare owner defaults on the mortgage payments, the other shareholders must either cover the deficiency or risk foreclosure against the entire complex.[64]

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[61] Ingersoll, *supra*, note 5, at 20.

[62] Henze, *supra*, note 2, §3.02[5][a], at 3-8.

[63] Ingersoll, *supra*, note 5, at 20.

[64] This issue is dealt with in the context of co-operatives generally in Burns and McLellan, *Condominium* [:] *The Law and Administration in Ontario* (1981), at 8.

Similar logic would apply to the taxes assessed against the property. Since there is but one tax bill addressed to the corporation, all of the timeshare owner-shareholders are responsible for payment if they do not wish to risk proceedings against the entire co-operatively owned property.

One further feature of co-operative timeshare arrangements—namely, the effect of the *Securities Act*[65] on the marketing of shares in a timeshare co-operative corporation—deserves some mention here. A provincial "co-operative" corporation, including a timeshare co-operative, may be incorporated under either the *Co-operative Corporations Act*[66] or the *Business Corporations Act, 1982*.[67] The effect of the *Securities Act* differs depending on which of these statutes is applicable.

Shares in a co-operative incorporated under the *Co-operative Corporations Act* fall within the definition of "security" under the *Securities Act*.[68] However, corporations of this type are, by virtue of the *Securities Act*, expressly exempt from its requirements in respect of such matters as the filing of a prospectus and the necessity of trading its securities through registered dealers.[69]

Shares in a corporation that is not incorporated under the *Co-operative Corporations Act*, but that carries on a business that is, in substance, a real estate co-operative venture,[70] also come within the definition of "security".[71] However, this type of corporation would not be exempt from the prospectus and registration provisions of the *Securities Act*. In *Re Avoca*

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[65] *Supra*, note 8.

[66] R.S.O. 1980, c. 91. Section 7(1) states that the corporate name of a co-operative must include the word "co-operative". Section 7(3) provides that, subject to certain exceptions, "[n]o corporation, association, partnership or individual not being a co-operative to which this Act applies, shall use in Ontario a name that includes the word 'co-operative' or any abbreviation or derivation thereof whether or not the word, abbreviation or derivation is used in or in connection with the name". "Co-operative" is defined in s. 1(1)5 to mean a "corporation carrying on an enterprise on a co-operative basis and to which this Act applies". Pursuant to s. 1(1)6, there are four requirements for an enterprise to operate on a "co-operative basis": (1) each member or delegate must have only one vote; (2) there must be no voting by proxy; (3) the interest on loan capital and dividends on share capital must be limited to a percentage fixed either by the Act or the articles of the particular corporation; and (4) the corporation must be operated as nearly as possible at cost.

[67] S.O. 1982, c. 4.

[68] *Supra*, note 8, s. 1(1)40.

[69] *Ibid.*, ss. 34(2)8 and 72(1)(a).

[70] Concerning such business corporations, also generally referred to as "co-operatives", see Farquharson, "Government Participation in Housing: Some New Directions in Co-operative Housing", in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada 1974* [:] *The Changing Face of Land Use Development* (1974) 317, at 321.

[71] *Securities Act*, *supra*, note 8, s. 1(1)40.i, ii, and v.

Apartments Ltd.,[72] the Ontario Securities Commission (OSC) held that the shares in a conventional real estate co-operative, not incorporated under the predecessor to the *Co-operative Corporations Act*,[73] fell within the definition of "security" under the *Securities Act*. In that case, the purchasers acquired a right to occupy specific units in a building by virtue of their ownership of shares in the corporate title holder. The developer's contention was that such purchasers did not believe that they were buying a speculative investment; rather, the developer argued that they were purchasing only a place in which to live. The OSC rejected the developer's submissions and found that the fact that the transaction involved the sale of "shares" was determinative under the Act.[74] Moreover, the OSC was persuaded by its own counsel's argument that, although the sale of a co-operative is in some respects a real estate transaction, it is a highly sophisticated one in which the purchaser may be perceived as deserving of the protection of securities regulation; accordingly, the developer must be made to conform to the various requirements of the securities legislation. In this way, the OSC satisfied itself that, not only would purchasers be cognizant of the precise nature of their interest in the co-operative, but they would be better protected in the event of a foreclosure on the property by a mortgagee.[75]

There seems to be no structural difference between timeshare co-operatives and residential co-operatives of the type considered in *Avoca*. Consequently, with respect to a timeshare co-operative not incorporated under the *Co-operative Corporations Act* (and, therefore, not expressly exempt from the requirements of the securities legislation), it would seem likely that the OSC would apply the same logic as in *Avoca* in order to bring the timeshare development within the regulatory purview of the *Securities Act*.

2. INSOLVENCY OF THE DEVELOPER

One of the greatest risks encountered by timeshare purchasers can be the prospect of the developer's insolvency. In the absence of adequate legislative safeguards, under certain circumstances purchasers stand to face a total loss of their investment should the developer be unable to meet the financial responsibilities of the project. In particular, the relatively high costs of timeshare marketing, combined with lender inexperience in dealing with the timeshare industry, may make the project prone to financial instability and, ultimately, to default on project loans.[76] Such an eventuality,

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[72] [1968] O.S.C.B. 154.

[73] At the time of *Avoca*, co-operatives, properly so-called, were required to be incorporated under Part V of the *Corporations Act*, R.S.O. 1960, s. 71. Since 1973, co-operatives have been incorporated under the *Co-operative Corporations Act*: see S.O. 1973, c. 101.

[74] *Supra*, note 72, at 157.

[75] *Ibid.*, at 155 and 158-59.

[76] Duke, "Timesharing: A Unique Property Concept Creates the Need for Comprehensive Legislation" (1981), 25 St. Louis U.L.J. 629, at 651.

of course, puts a purchaser's interest entirely at risk, since the institutional creditors will doubtless have secured their interests in a way that undermines any inchoate interests of the timeshare purchasers.

The most serious problems in this respect are associated with the right-to-use forms of timeshare interest. Purely contractual rights are especially vulnerable since the purchaser's lack of an interest in the underlying fee leaves her virtually unprotected from the effects of the developer's financial dealings both before and after the closing of the sale. Where it is not possible to register the timeshare interest on title, a foreclosing creditor may take the property without regard to any such interest. Thus, in the absence of legislative safeguards, the only recourse for a purchaser in such a situation would be to attempt to sue the developer for breach of contract. This is not, however, a very promising avenue of redress since the developer who has been unable to meet the costs of financing the project will in all likelihood lack the assets against which to execute any eventual judgment. Moreover, the resort to judicial process is itself costly and time-consuming and, as such, may be little comfort to a purchaser who has seen her investment vanish before any benefits in the form of use of the premises have ever been reaped.

In addition to the serious problems confronting the right-to-use purchaser, a number of the problems of insolvency may have an impact upon timeshare fee owners. For example, a developer's bankruptcy prior to completion of the project might well result in the loss of deposit monies paid, notwithstanding that the purchaser's interest took the form of a proprietary entitlement. Furthermore, a bankruptcy of the developer after completion of the project would necessarily have a detrimental impact on any of the developer's ongoing responsibilities. Thus, if under some form of timeshare arrangement the developer retains responsibility for managing the resort, the advent of insolvency would at best disrupt the management[77] and, in all likelihood, deprive the project of maintenance services.

Although the particular proposals for legislative solutions to the insolvency problem will be dealt with in a later portion of this Report,[78] it is appropriate at this point to note that most of the timeshare statutes in the United States have built-in protective devices that are designed to safeguard a purchaser's investment in the timeshare facility should the developer be unable to meet his financial responsibilities. Thus, the various state timeshare statutes generally require that the developer enter into non-disturbance agreements where the project is subject to any liens or encumbrances; or, in the alternative, the developer must post bonds or arrange for some other type of security sufficient to safeguard the purchaser's interests. Indeed, some statutes have gone so far as to require that title to the timeshare property not be retained by the developer so long as the project has been financed through an encumbering of the property; rather, title

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[77] Ingersoll, *supra*, note 5, at 27.

[78] *Infra*, ch. 4, sec. 7.

would be held in trust pending satisfaction of any such creditors. Similarly, most American timeshare statutes require that all deposit monies paid by purchasers be held in trust for a given period, generally corresponding to the statutorily imposed time in which the purchaser can unilaterally rescind the contract of purchase and sale.

3. MANAGEMENT OF THE PROJECT

Most commentators agree that the problems engendered by poor management of a timeshare complex are second only to insolvency of the developer in depreciating the value of the purchaser's investment. Given the hotel or resort character of most timeshare complexes, the managerial functions are far more extensive and complicated than those associated with the common areas of a condominium building. Housekeeping, general maintenance and upkeep of the property and recreational facilities, and the management of the assorted personnel, represent elaborate tasks in the context of a property catering to a large number of transient residents. For example, at the end of each purchaser's possessory period the timeshare unit must be restocked, cleaned, and often repaired in preparation for the arrival of the next owner. This, of course, is in addition to any major repairs of the building, furnishings, or facilities for which management would be responsible.

In acting as the general administration for a property in which no one owner has an interest that is sufficiently large to warrant the assumption of financial responsibilities, management must often assume a number of bookkeeping functions. By way of illustration, management is generally responsible for the preparation of an annual budget for the timeshare development, the establishment of a reserve fund for long term maintenance and capital improvement,[79] and implementation of the allocated maintenance projects within the confines of the short term and long term budgets. Additionally, management will face the task of assessing and collecting each timeshare owner's annual maintenance fees, which, along with property taxes, telephone, utility fees, and any other special assessments that may arise, may be relatively difficult to collect from absentee owners whose original attraction to the investment was in part based on the one-time outlay of cash for future vacations.

There are any number of additional miscellaneous functions that management must fulfil if the project is to be administered properly. Thus, management is generally responsible for obtaining comprehensive general liability insurance for injuries or property damage arising out of the use of the timeshare unit. Furthermore, management will doubtless have to take on the enforcement of the various rules of the timeshare development, and might well be required to see to the arbitration of any disputes that might

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[79] Masteller, "Practical Management for Timesharing", in *Timesharing II*, *supra*, note 5, 135, at 137-38.

arise between the timeshare owners, or between the owners and the developer.[80] As can be seen, a default on any one of the multifarious managerial tasks could potentially have a significantly adverse impact on the purchaser's use and enjoyment of the property in which she has invested.

Generally speaking, the problems of mismanagement embody an even greater risk to the purchaser of right-to-use interests than they do to timeshare fee owners, since the latter tend to contract into an association and hire independent management, while the former are dependent for managerial services on the developer of the project. The developer is, of course, in an especially strong position by virtue of its retention of the proprietary interest in the property, and thus ordinarily provides direct supervision of any agent hired for the actual management operations.[81] Notwithstanding a certain amount of delegation to the holders of right-to-use interests, the managing agent is characterized as the agent of the developer rather than of the users and, as such, only the developer has the authority to terminate the managerial agent's contract. Accordingly, it is necessary that all timeshare owners, and especially those who have purchased a right-to-use type of interest, be protected from managerial disruptions. Timeshare owners must be assured that in the long term the timeshare resort will not only remain solvent, but will be maintained at the same level as when their investment was first made.

A survey of the current legislation in the United States reveals that there are a number of different ways in which the management of timeshare resorts may be carried out. The basic functions of management are, of course, the same everywhere, and broadly include the tasks described above (short and long term maintenance, budgetary responsibilities, collection of assessments, insurance, and so on). The fundamental distinction in the American statutory treatment of timeshare management is in the nature of the managerial entity itself. That is, the underlying distinction between fee ownership and right-to-use interests, around which the various forms of timesharing are clustered, is projected into the managerial component of timeshare regulation. Thus, the statutes generally provide that, where a fee ownership type of timeshare project is concerned, the management will be allocated to an association created by the timeshare owners themselves, which, in turn, will delegate this function by retaining an independent managing agent.[82] This is thought to be a logical culmination of the notion of fee ownership, since it displaces the developer from the managerial function once enough units have been sold for an association to be formed and to begin operations.

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[80] Henze, *supra*, note 2, §§6.05 and 6.06, at 6-10 to 6-16.

[81] *Ibid.*, §6.02[2], at 6-2.

[82] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1708; Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-107; Virginia Real Estate Time-Share Act, Va. Code §55-368; Arkansas Time-Share Act, Ark. Stat. Ann. §50-1310; and Georgia Time-Share Act, Ga. Code Ann. §44-3-167.

Projects in which the developer retains the fee in the property and the timeshare purchasers acquire a contractual right-to-use are generally classified in a separate statutory category wherein it is the developer, rather than an owners' association, that takes responsibility as the managerial entity.[83] As with an association, however, the developer is generally required to hire an independent managing agency. In addition, most of the American statutes require that some sort of advisory board, consisting of timeshare right-to-use owners, be constituted in order to temper any unilateral actions on the developer's part.[84] Indeed, it may be provided by statute that certain managerial decisions, such as the encumbering of the timeshare project for the purpose of financing renovations or other capital improvements, must be taken pursuant to the consent of the majority of the existing holders of right-to-use interests.[85] In this way, a balance is effected between the competing interests of the developer as owner and the timeshare users, ensuring that any major expenditures are properly allocated between long term and short term benefits.

Not all of the American timeshare statutes, however, draw such an express distinction between the way in which ownership and non-ownership types of project are managed. Some state legislation leaves the particular form of the managerial entity to the discretion of the developer, although even in these instances there is a statutory requirement to create some form of management body before any of the timeshare interests are sold. Some statutes explicitly spell out the type of options that the developer might choose. In such a statutory framework, the developer may, for example, choose to retain managerial responsibilities itself, establish an owners' association, retain an independent management firm, or somehow combine any of these options.[86] Where this is done, however, the range seems to vary from a broad list of possible alternatives, to a narrow choice between the formation of an owners' association and the retention by the developer of sole managerial responsibility.[87]

It would seem to be common legislative practice to provide timeshare owners with some type of power to discharge the managing entity. Generally, fee owners of timeshare estates are entitled to put the dismissal of the

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[83] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1711; Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-110; Virginia Real Estate Time-Share Act, Va. Code §55-371; Arkansas Time-Share Act, Ark. Stat. Ann. §50-1313; and Georgia Time-Share Act, Ga. Code Ann. §44-3-170.

[84] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1711(7); Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-110(7); Arkansas Time-Share Act, §50-1313.7; and Georgia Time-Share Act, Ga. Code Ann. §44-3-170(7).

[85] See Georgia Time-Share Act, Ga. Code Ann. §44-3-170(13).

[86] See, for example, Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.13 (West). See, also, Or. Rev. Stat. §94.846.

[87] See National Conference of Commissioners on Uniform State Laws, Model Real Estate Time-Share Act, Uniform Laws Ann., Vol. 7B (hereinafter referred to as "Model Act"), §3-101(a)

managing entity to a vote and to replace the management if there is dissatisfaction on the part of a majority of owners.[88] While it is rare for right-to-use interest holders to be provided with such direct control, there is often some statutory provision for management dismissal by such holders. Frequently, the state legislation provides that an owner of any form of timeshare interest may apply to the court to have the existing management dismissed.[89]

Finally, several state timesharing statutes require that a timeshare owners' association be formed regardless of the form of ownership on which the project is structured, and that all of the powers of such association be exercised by a board of directors. These provisions generally go on to require that the association's board of directors select a managing agent to perform all of the functions necessary to the effective management of the project and to perform various administrative tasks on behalf of the association.[90] At times, however, there is a *caveat* in the owners' association provisions with respect to right-to-use projects, which stipulates that, although a timeshare association must be created, the developer may elect to retain the right to manage and maintain the property.[91] The exercise of this right by the developer has been coupled with the requirement of a public offering statement under the relevant statute, so that potential purchasers are given notice of the developer's intention in this regard.[92] Ultimately, the timeshare owners' association is provided with some power to terminate the developer's right to manage the property, should there be an abuse of this right by the developer to such an extent that the project's operation as a timeshare enterprise is jeopardized.[93]

As will be discussed later in this Report, timeshare projects in Ontario that fall within the purview of the *Condominium Act*[94] are subject to a number of managerial provisions that, if anything, surpass the level of detail provided in the American timeshare legislation. Generally, responsibility for management is that of the board of directors of the condominium corporation, which is elected by the owners.[95] This delegation to the board of directors, however, is not complete. Thus, certain significant decisions are

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[88] See, for example, Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.14 (West).

[89] See, for example, Or. Rev. Stat. §94.864.

[90] See, for example, Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.20 (West).

[91] *Ibid.*, §9:1131.20I(1).

[92] *Ibid.*, §9:1131.20I(3).

[93] *Ibid.*, §9:1131.20I(5). Under this provision, the developer can be removed from management if it is shown to have "failed to maintain the property in a condition suitable for the use for which it was intended".

[94] R.S.O. 1980, c. 84. See *infra*, ch. 3, sec. 2.

[95] *Supra*, note 94, s. 15(1).

stipulated under the Act as being subject to the unit owners' approval.[96] Again, a type of balance is struck between the interest in efficient management by a limited number of representatives and the necessity of safeguarding the interests of the broader constituency of unit owners.

As is evident, the numerous dimensions to the problem of project management tend to multiply exponentially, producing a vast number of policy options with respect to statutory regulation. While it is impossible to set out every managerial detail or to explore every possible alternative in the legislative approach to such details, the larger decisions with respect to the structuring of management are common in all jurisdictions. Having laid out at this stage the broader themes and the various problems needed to be addressed by any future enactment, a later portion of this Report dealing with the proposed new legislation will set out the Commission's specific recommendations in detail.[97] Suffice it to say here that the issues involved in framing management requirements dictate that the legislative coverage of this topic be comprehensive. The severity of the impact of mismanagement on timeshare purchasers and the often competing interests of the developer giving rise to the possibility of abuse or neglect make effective management an ongoing concern touching on the viability of timesharing as a vacation property holding concept.

4. MARKETING OF TIMESHARE INTERESTS

Perhaps not the most serious, but certainly the most pervasive, problems encountered in jurisdictions where timeshare sales volume is high are those involving aggressive marketing techniques. Timeshare sales personnel are generally employed on a commission basis, much like real estate agents in the housing or conventional condominium markets. However, the nature of timeshare interests is such as to require promoters to sell up to fifty such interests in each unit in the development, thus substantially increasing the pressure in the sales environment.

The increase in potential for abuse seems to flow naturally from the increase in economic pressure felt by sales personnel, and reports from the United States indicate that such practices as deceptive or misleading promotions and excessively aggressive approaches to customers have become widespread.[98] There have been consumer allegations of misrepresentation through the use of such promotional devices as telephone solicitations, newspaper advertisements, sweepstakes offers, and gift giveaways. As one

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[96] See, for example, ss. 15 and 34 (election of directors and auditors), s. 3(4) (amendments to the declaration), s. 28(2) (passing of by-laws), s. 1(1)(x) (special by-laws passed by directors), and s. 38 (substantial alterations to common elements).

[97] *Infra*, ch. 4, sec. 8.

[98] With respect to such practices, see Madsen, "Consumer Complaints: Focus on Sales Practices", in *Resort Timesharing Today* (August, 1981) 20, reprinted in *Timesharing II*, *supra*, note 5, at 56-57.

commentator has noted, most of the litigation in the United States involving timeshare operations has centred, in one way or another, on the marketing aspect of the projects. "Allegations in these suits have ranged from simple failure to register before selling, to a litany of misrepresentations covering gifts and prizes, maintenance fees, travel arrangements, exchange availability, and the type of interest the prospect was buying."[99]

Similar problems with respect to aggressive marketing techniques have been experienced in British Columbia, where two assurances of voluntary compliance (AVC's) have been issued pursuant to that Province's *Trade Practices Act*[100] in response to findings that a number of timeshare promoters marketing developments in southern locations in the United States to consumers in British Columbia were engaged in practices that violated statutory norms.[101] The issuance of the AVC's was responsive to numerous consumer allegations of "high-pressure tactics, forfeited deposits, foreign exchange ripoffs and non-existent gift schemes".[102] Although there is some debate about the jurisdictional applicability of the British Columbia consumer protection legislation to timeshare sales,[103] the very fact that the administrative machinery was triggered should reinforce concerns in Ontario regarding timeshare marketing. Although, as will be discussed at a later stage of this Report, an assortment of miscellaneous provincial and federal statutes currently deal in one way or another with misleading and aggressive sales techniques,[104] the fact that these problems are apparently endemic to the timeshare industry serves to reinforce the perceived need for a comprehensive regulatory package.

5. DISCLOSURE OBLIGATIONS AND RESCISSION RIGHTS

In many respects, the goal of achieving adequate disclosure for timeshare purchasers and entrenching a period in which there will be a right

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[99] *Ibid.*, at 56. Indeed, an interview with one real estate broker in south Florida, where conventional condominiums and other vacation properties represent a particularly high percentage of the sales market, has indicated that the general level of consumer distrust of timeshare promoters is thought to be high enough to warrant a disassociation of mainstream brokerage services from timeshare promotions. (Interview conducted on July 31, 1986 with Ruth D. Morgan, Broker, Sterling Park Realty Inc., Hollywood, Florida.)

[100] R.S.B.C. 1979, c. 406.

[101] For a description of these events, see Altro, "Resort Time-Sharing: Why Real Estate's New Brain-Child Needs its Own Legislation" (1981), 41 R. du B. 1054, at 1082.

[102] Neilson, "Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation" (1981), 19 Osgoode Hall L.J. 153, at 179.

[103] *Ibid.*

[104] See the discussion, *infra*, ch. 3, sec. 3(b), of the *Competition Act*, R.S C. 1970, c. C-23; *Business Practices Act*, R.S.O. 1980, c. 55; *Consumer Protection Act*, R.S.O. 1980, c. 87; and *Real Estate and Business Brokers Act*, R.S.O. 1980, c. 431.

of rescission of any agreement of purchase and sale represents the reverse side of the coin to the issues involved in the regulation of marketing practices. As timesharing is not only a complicated (and non-uniform) type of property holding, but a relatively new way of marketing investments in vacation properties, the potential exists for consumer misapprehension of the precise nature of the product. The combination of implicit trust placed by purchasers in the sales agents and the developers' representatives and the pressured economic context under which the promoters operate, as described above, may well lead to either active misrepresentations or, perhaps more likely but no more innocuous, the misleading of consumers by omission. It would therefore seem important to include in the regulation of timeshare sales provisions ensuring that potential purchasers are afforded complete disclosure regarding the precise nature of the product they are buying, and that they are given sufficient time in which to consider this information and to rescind any hasty decision.

A survey of the comprehensive timeshare legislation that has been enacted in the United States reveals that the central importance of full and fair disclosure to the timeshare consumer has been recognized. Generally, the state statutes contain a requirement that, prior to the sale of a timeshare interest, the developer must deliver to each purchaser a copy of a public offering or disclosure statement.[105] Such statements are usually required to contain a general description of the timeshare property (including the type and number of units available), the schedule for completion of all buildings entailed in the project, a description of any liens or other encumbrances on the property, information concerning management of the property, a description of the insurance coverage, information concerning the projected budget (including the nature and purposes of all budgetary items and assessments), and copies of all timeshare instruments and documents relevant to the purchase of the timeshare interest. In addition, most of the state enactments require that the purchaser be provided with information concerning the opportunities for timeshare exchanges that might be available.[106] It would seem that, due to the popularity of exchange programs, this service is particularly susceptible to abusive sales practices.[107] Thus, the statutory provisions relevant to exchange programs require that potential purchasers be informed of, among other things, the name and

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[105] See, for example, Model Act, *supra*, note 87, §4-102; Nebraska Time-Share Act, Neb. Rev. Stat. §76-1713; Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-112; Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.07 (West); Virginia Real Estate Time-Share Act, Va. Code §55-374; Arkansas Time-Share Act, Ark. Stat. Ann. §50-1315A; and Hawaii Rev. Stat. §514E-9.

[106] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1714; Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-122(g); Hawaii Rev. Stat. §514E-9.5; Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.18 (West); Virginia Real Estate Time-Share Act, Va. Code §55-374B; and Arkansas Time-Share Act, Ark. Stat. Ann. §50-1315B.

[107] Ragatz, "Who Are the Timeshare Consumers?", in *Timesharing II*, *supra*, note 5, 29, and Duke, *supra*, note 76, at 646.

address of the particular exchange organization, the number and location of timeshare units eligible to participate in the program, the expense of participating in the exchange program, and the percentage of confirmed exchanges within the prior year.

Finally, the disclosure documentation is normally required to include a reference to the purchaser's right to rescind any agreement of purchase and sale within a specified time period, and to have any deposit monies paid in connection with the purchase of a timeshare interest held in escrow at least until expiration of the rescissionary period. Such a "cooling-off period" has now become a common feature in comprehensive timeshare statutes,[108] and in many respects parallels the developments achieved in legislation governing the sale of goods, with the rescissionary times varying from three to fifteen days. Although the major impetus for such statutory provisions is, of course, consumer protection, in certain states developers as well as purchasers are entitled to rescind the agreement.[109]

The right of rescission may in general be seen to go hand in hand with the disclosure requirements, since its primary function is to provide an adequate period for the consumer to absorb the information that the developer has made available. These regulatory approaches have become staples in timeshare enactments in the United States, as they directly counter some of the more blatantly problematic aspects of timeshare marketing. Given the equivalent development in other fields of consumer protection in commercial transactions, any Ontario timeshare legislation would be remiss in not including some such provisions.

6. PARTITION OF TIMESHARE INTERESTS

As indicated in the discussion of tenancy-in-common ownership structures, one problem confronting timesharing is the possibility that one cotenant might apply under the *Partition Act*[110] for partition of the property, thereby forcing a sale of the timeshare unit. In Ontario, partition is a discretionary remedy,[111] which can be refused to the applicant on any number of grounds. A person who holds land as, for example, a joint tenant

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[108] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1716(1); Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-114(a); Hawaii Rev. Stat. §514E-8; Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.10 (West); Virginia Real Estate Time-Share Act, Va. Code §55-376; South Carolina Vacation Time Sharing Plan Act, S.C. Code §27-32-40(3); Arkansas Time-Share Act, Ark. Stat. Ann. §50-1318A; and Georgia Time-Share Act, Ga. Code Ann. §44-3-174(a).

[109] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1716(2); Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-114(b); Hawaii Rev. Stat. §514E-8; Arkansas Time-Share Act, Ark. Stat. Ann. §50-1318B; and Georgia Time-Share Act, Ga. Code Ann. §44-3-174(b).

[110] *Supra*, note 17.

[111] *Re Hutcheson and Hutcheson*, [1950] O.R. 265, [1950] 2 D.L.R. 751 (C.A.).

or a tenant-in-common has a *prima facie* right to partition or court-ordered sale of such land at any time, and there is said to be a corresponding obligation on co-tenants to permit partition or sale. Such a step will be taken by a court unless a "sufficient reason appears why such an order should not be made".[112] Thus, in one decision that may be highly relevant to timeshare co-tenants, it has been held that relative hardship to the parties is a relevant factor to be taken into account in the court's exercise of the discretion conferred by the *Partition Act*.[113] However, the case-by-case process of line drawing adds an unpredictable element to timeshare holdings structured on a tenancy-in-common basis.

It has now become a general practice of developers to attempt to avoid the problem of partition by including in the timeshare agreement a covenant requiring that purchasers relinquish their right to partition during the term of the timeshare arrangements. However, a question arises concerning whether partition is a type of legal right that can be effectively waived by contract.[114] The argument that it cannot be waived does not appear to be strong in the face of the general movement of property law towards facilitating the exercise of free will by property owners.[115] Since partition arises as a manifestation of private ordering rather than an imposition of social policy, the contractual waiver of partition rights should logically be enforceable. The very presence of any doubt, however, militates towards statutory clarification of this issue; and, accordingly, a majority of the American timeshare statutes have included a provision validating such a waiver.[116]

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[112] Oosterhoff and Rayner (eds.), *Anger and Honsberger* [:] *Canadian Law of Real Property* (2d ed., 1985), Vol. 1, §1502.13, at 812.

[113] *Re Yale and MacMaster* (1974), 3 O.R. (2d) 547, 46 D.L.R. (3d) 166 (H.C.J.).

[114] See Engle, *supra*, note 12, at 433.

[115] See, for example, the movement toward presumption of tenancy-in-common rather than the traditional presumption of joint tenancy, the former giving the co-tenants more freedom in the property holding relationship: *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 13(1).

[116] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1712, which provides that "[n]o action for partition of a unit may be maintained except as permited by the time-share instrument". See, also, Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-111; Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.22 (West); and Virginia Real Estate Time-Share Act, Va. Code §55-372.

CHAPTER 3

THE PRESENT LAW AND ITS POTENTIAL FOR REGULATING TIMESHARING

In this chapter, we shall discuss in some detail the impact on timesharing of existing Ontario and federal legislation that is most relevant to this subject and shall assess the utility of using such legislation as a means of regulating the timesharing industry.

1. *SECURITIES ACT*

(a) Applicability of the *Securities Act* to the Sale of Timeshare Interests

The applicability of the *Securities Act*[1] to timeshare sales in Ontario is at present ambiguous. Subject to certain exemptions,[2] the Act prohibits trading in securities except through a dealer registered with the Ontario Securities Commission (OSC),[3] and, where the trade would be a "distribution", unless a prospectus has been filed.[4] The threshold question, therefore, is whether a timeshare interest is a "security", which is defined as including, *inter alia*, "any investment contract, other than an investment contract within the meaning of the *Investment Contracts Act*".[5] It is this clause in the definitional section that is said to be the "most important branch of the definition", as it is here that the statute "catches instruments or interests that might not otherwise be recognized as securities".[6]

Before delving into the various permutations of the phrase "investment contract", it may be worth noting that timeshare interests could clearly fall

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[1] R.S.O. 1980, c. 466.

[2] See *infra*, note 36.

[3] *Securities Act*, *supra*, note 1, s. 35. The registration requirement is discussed *infra*, this ch., sec. 1(b).

[4] *Securities Act*, *supra*, note 1, s. 52. The prospectus requirement is discussed *infra*, this ch., sec. 1(b). For the exemptions, see *infra*, note 44.

[5] *Securities Act*, *supra*, note 1, s. 1(1)40.xiv.

[6] Alboini, *Securities Law and Practice* (1984), Vol. 1, §INT.1.40, at 0-24.

under the definitional inclusion of "any document constituting evidence of title to or interest in the...property...of any person or company".[7] It would seem, however, that the scope of this sub-paragraph is so wide as to have fallen out of favor with the OSC as a section to be relied on in regulating interests. It has therefore been characterized as a "statutory weapon of last resort for the Commission and the judiciary to confront new schemes that do not fit within the more specific tests that have been enunciated in the remaining branches of the definition",[8] and does not appear likely to be given a broad application in the present instance. Indeed, the OSC's spokesmen have in effect confirmed that, within the OSC, the regulation of timeshare sales is not perceived to be of sufficient import to invoke the blanket regulatory authority over the trading of proprietary entitlements, although, in the future, it might well be considered under the investment contract heading.

The leading Canadian case in which the "investment contract" concept was discussed, and the one that provides the most guidance as to the judicial interpretation of this term, is *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission*.[9] Mr. Justice de Grandpré, writing for the majority of the Supreme Court of Canada, made extensive reference to the American authorities on the question of interpretation, pointing out that while the Ontario statute and its American counterparts do not employ identical terminology, the expression "investment contract" is common to both.[10] In addition, de Grandpré J. noted, "the policy behind the legislation in the two countries is exactly the same, so that considering the dearth of Canadian authorities, it is a wise course to look at the decisions reached by the U.S. Courts".[11] Thus, in formulating its own test, the Court had resort to the two most prevalent tests employed by the American judiciary in interpreting the definitional scope of both state and federal securities legislation.

The leading American case considered by Mr. Justice de Grandpré, *Securities and Exchange Commission v. W.J. Howey Co.*,[12] would appear highly pertinent to the question of timeshare interests, in that it dealt with investments in real property by purchasers who received a warranty deed as evidence of title in place of some instrument that would have been closer in form to a conventional security. The facts of the case involved a scheme of investments in a Florida citrus fruit business, each investment being structured in the form of a sale to the investor of a small tract of citrus acreage

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[7] *Securities Act*, *supra*, note 1, s. 1(1)40.ii.

[8] Alboini, *supra*, note 6, §INT.1.40[b], at 0-32.

[9] [1978] 2 S.C.R. 112, (1977), 80 D.L.R. (3d) 529 (subsequent references are to [1978] 2 S.C.R.).

[10] *Ibid.*, at 126.

[11] *Ibid.*

[12] 328 U.S. 293, 66 S. Ct. 1100 (1946) (subsequent references are to 328 U.S.).

along with a service contract whereby the vendor continued to cultivate the trees. The United States Supreme Court found that it could properly disregard the form of the transaction for its substance, and articulated a flexible standard by which to accomplish "the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of the 'many types of instruments that in our commercial world fall within the ordinary concept of a security' ".[13] What distinguished this transaction from the ordinary sale of a citrus grove was the absentee nature of the purchasers, so that, much like any other business venture, "[t]he investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise".[14] Accordingly, the investment contract test in *Howey* was summarized as follows:[15]

> In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

In the *Pacific Coast* case,[16] Mr. Justice de Grandpré adopted the test in *Howey*, as modified by subsequent American jurisprudence. With respect to the "common enterprise" aspect of the test, he noted:[17]

> [A common] enterprise exists when it is undertaken for the benefit of the supplier of capital (the investor) and of those who solicit the capital (the promoter). In this relationship, the investor's role is limited to the advancement of money, the managerial control over the success of the enterprise being that of the promoter; therein lies the community. In other words the 'commonality' necessary for an investment contract is that between the investor and the promoter. There is no need for the enterprise to be common to the investors between themselves.

The "common enterprise" aspect of the *Howey* test was perceived to be closely related to the second aspect of the test, that is, the requirement that the investors' profits flow from the efforts of others. However, adopting the modification of the second aspect of the test, de Grandpré J. indicated that the profits need not emanate "solely" from the activities of the promoters and other persons, and that, in order to qualify as an investment, the investor need not remain absolutely detached from the enterprise. Rather, de Grandpré J. adopted what, in another American case, was said to be a "more realistic test, whether the efforts made by those other than the

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[13] *Ibid.*, at 299.

[14] *Ibid.*, at 300.

[15] *Ibid.*, at 298-99.

[16] *Supra*, note 9.

[17] *Ibid.*, at 129-30.

investor are the undeniably significant ones, those essential managerial efforts which effect the failure or success of the enterprise".[18]

In addition to the straightforward *Howey* test, which assumes, notwithstanding the modifications adopted by Mr. Justice de Grandpré, a certain amount of passivity on the investor's part, a second test of "investment contract" has arisen in a line of American cases dealing with the sale of a franchised business. Whereas *Howey* would on its own suffice to bring within the scope of securities regulation those cases in which the franchisee does little more than supply operating capital for the franchisor, state courts have developed alternative theories "covering even those cases in which the franchisee 'makes the hamburgers' ".[19] The second test, referred to by Mr. Justice de Grandpré, was the test articulated by the Supreme Court of Hawaii in *State of Hawaii v. Hawaii Market Center, Inc.*,[20] which focuses on the provision by the investor of the "risk capital" for the promoters' business. Under the "risk capital" test, as now applied by many states in considering the reach of their state securities laws, an investment contract is said to be created when:[21]

> (1) an offeree furnishes initial value to an offeror, and
>
> (2) a portion of this initial value is subjected to the risks of the enterprise, and
>
> (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and
>
> (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

As can be seen, the primary difference between the *Howey* and the "risk capital" tests is that, while the former concentrates on the reaping of "profits" by the investor, the latter examines the transaction more broadly in terms of the accrual of any "valuable benefit" to the investor. Thus, in franchising situations, for example, the franchisor need not actually earn the franchisee's income, since it would suffice to constitute an investment contract if the franchise arrangement simply provided the franchisee with the means to carry on his own business. So long as there is some degree of investor risk, an assortment of arrangements wherein the investing party does not actually reap a direct benefit in the form of quantifiable profits fall within the ambit of securities regulation.[22]

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[18] *Ibid.*, at 129, quoting *Securities and Exchange Commission v. Glen W. Turner Enterprises Inc.*, 474 F. 2d 476 (1973), at 482.

[19] Loss, *Fundamentals of Securities Regulation* (1988), at 202.

[20] 485 P. 2d 105 (Hawaii Sup. Ct. 1971).

[21] *Ibid.*, at 109.

[22] The focus on the element of risk assumed by the investor is discussed in relation to timeshare interests in Bloch, "Regulation of Timesharing" (1982), 60 J. Urban L. 23, at 33-34.

As indicated by the OSC in *Re Shelter Corporation of Canada Ltd.*,[23] "[t]he current position in Canada appears to be that there are two tests applicable in determining whether or not an interest is an investment contract". Both the *Howey* and the "risk capital" lines of analysis have been applied by the OSC and the courts in a complementary fashion, rather than as mutually exclusive alternatives as perceived by the state and federal courts and the Securities and Exchange Commission in the United States. As a consequence, the applicability of both investment contract tests to the timesharing industry must be examined.

It is, of course, possible that the purchase of a timeshare interest could be perceived as constituting "an investment of money in a common enterprise with profits to come solely from the efforts of others",[24] as enunciated in *Howey*. This type of determination would appear to be unlikely, however, where the project is structured as a fee ownership arrangement, since the individual owners will not only disassociate the developer from title to the property, but will ultimately take part in the active management of the property through the owners' association. With right-to-use properties, on the other hand, the *Howey* test would seem far more applicable. As will be recalled, such interests vest only a contractual right in the purchaser, so that the developer or promoter will retain the fee in the property. Moreover, and most significantly for the analysis of an investment contract, managerial control over right-to-use timeshare projects will generally remain with the developer, thus more firmly establishing the "common enterprise" between the promoter and the investors as required under the *Howey* reasoning. As in the case of the absentee citrus grove owners, the right-to-use interest holders will necessarily be reliant on the managerial skills and financial stability of the developer-promoter to ensure the success of the investment.

In a similar fashion, timeshare interests based on contractual rights are far more likely to fall under the "risk capital" test of investment contract than are timeshare interests wherein the investor acquires title to the property. Since the purchaser of a contractual timeshare interest remains inextricably linked to the developer in order for her investment in the project to enjoy success, the situation is far closer to that of an investor providing risk capital to an enterprise with which she is otherwise uninvolved. Furthermore, given the broadening of the test from "profits" in *Howey* to a "valuable benefit of some kind, over and above the initial value" in *Hawaii Market*,[25] the benefit gained by the right-to-use interest holder in enjoying the resort and its facilities may readily fall within the definition. Whereas the contractual waiver of the right to alienate the right-to-use interest, and the consequent undermining of any secondary market, may well serve to deny timesharing the quality of a profit-making investment

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[23] [1977] O.S.C.B. 6, at 11.

[24] *Securities and Exchange Commission v. W.J. Howey Co.*, *supra*, note 12, at 301.

[25] *Supra*, note 20, at 109.

contract, it would not take any great interpretive gymnastics on the part of the OSC to construe a vacation use as a valuable benefit.

In Mr. Justice de Grandpré's majority opinion in the *Pacific Coast* case,[26] the alternative American tests are applied in a rather malleable fashion. Thus, after exploring both the federal and the state case law, he concludes that the notion of an "investment contract" must be said to embody a "flexible rather than a static principle",[27] and that the legislative policy of replacing *caveat emptor* in security-related transactions should be vindicated by the courts "even if tests carefully formulated in prior cases prove ineffective and must continually be broadened in scope".[28] As a consequence, although the case may be read as adopting the two tests articulated by American courts, it may also be seen to provide the OSC's decision makers with a wide scope of interpretive discretion in formulating "whatever definition of security is considered appropriate in given circumstances".[29]

As a result of the expansion of the tests from "profit" to "valuable benefit" in the American courts and the inference of a broad policy interpretation by the Supreme Court of Canada, the OSC may be said to have great latitude with respect to such unique investment structures as timeshare interests.

To the extent that timeshare interest holders are perceived to share in income-producing activities (for example, percentages from restaurants and vending machines), or to participate in the pooled rental income of the timeshare resort, the interests may well fall within the *Howey* test of "investment contract".

As indicated earlier in this Report, shares in a corporation carrying on a business that is, in substance, a real estate co-operative venture would already fall within the regulatory provisions of the *Securities Act* by virtue of the decision in *Re Avoca Apartments Ltd.*[30] However, as we also said, while shares in a timeshare co-operative incorporated under the *Co-operative Corporations Act*[31] would fall within the definition of "security" in the *Securities Act*, such corporations are, by virtue of the latter statute, exempt from its registration and prospectus requirements.[32]

To date, timeshare interests have not been subjected to regulation as securities. But, as we have seen, it is clear that timesharing represents a range

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[26] *Supra*, note 9.

[27] *Ibid.*, at 127, quoting *Howey*, *supra*, note 12, at 299.

[28] *Supra*, note 9, at 132.

[29] Alboini, *supra*, note 6, §INT.1.40[m][ii], at 0-54.

[30] [1968] O.S.C.B. 154. See *supra*, ch. 2, sec. 1(b)(iv).

[31] R.S.O. 1980, c. 91.

[32] *Securities Act*, *supra*, note 1, ss. 34(2)8 and 72(1)(a).

of different types of interest, some of which could be regulated by the OSC. Moreover, if timeshare interests are marketed through advertising or promotional devices that somehow emphasize the economic benefits to be derived by purchasers from the managerial efforts of the developer-promoter, the characteristics of an "investment contract" will be far more readily apparent and the OSC will no doubt be far more tempted to invoke its potentially broad jurisdiction under the *Securities Act*. At the other end of the spectrum, of course, those timeshare interests that are specifically designed to be closer in nature to a traditional pre-paid vacation would be more likely to fall beyond the policy concerns of the OSC.

(b) Requirements under the *Securities Act*

In considering the option of utilizing the *Securities Act* as the regulatory context in which to place the timeshare industry, it may be noted that in certain states in the United States, and for certain purposes of federal law in the American system, timeshare interests have been classified as securities. If such a result were thought to be desirable in Ontario, the present uncertainty, described above, could readily be resolved by amending the definition of "security" in the Act to include any or all forms of timesharing. Indeed, in 1978 a Bill was introduced in the Ontario Legislature that expressly provided that right-to-use types of timeshare interest should be considered to be securities for the purposes of the Act.[33] Thus, section 1(1)40.xv of the Bill, which was deleted after First Reading following strong representations from the Ministry of Industry and Tourism, defined "security" to include

> any document constituting evidence of an agreement purporting to grant an exclusive right to use or occupy any part of specific real property for residential, recreational or vacation purposes for a specific time or times within any specific period of time where the agreement contemplates the grant of the same or similar rights to other persons or companies on a time sharing basis with respect to the specific real property.

Where a timeshare interest is a "security" within the meaning of the present *Securities Act*, a number of requirements might be imposed that could benefit the purchasers of such interests. For example, one of the primary purposes of the *Securities Act* is "to ensure that honest, trustworthy and competent persons are engaged in the securities business".[34] To implement that objective, at least in part, section 24(1)(a) of the Act provides that "[n]o person or company shall...trade in a security unless the person or company is registered as a dealer, or is registered as a salesman...of a registered dealer and is acting on behalf of the dealer".[35] Therefore, in the

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[33] *The Securities Act, 1978*, Bill 7, 1978 (31st Leg. 2d Sess.).

[34] Alboini, *supra*, note 6, §10.2.1, at 10-13.

[35] *Securities Act*, *supra*, note 1, s. 24(1)(a). The term "trade" is defined broadly to include not only a sale or disposition of a security, but also, for example, "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance" of a sale or disposition of a security. On the other hand, the purchase of a security is expressly excluded from the definition. See *Securities Act*, *ibid.*, s. 1(1)42.

absence of an appropriate exemption,[36] a developer would either have to market the timeshare interests through a registered securities dealer,[37] or seek registration itself under the Act as a dealer,[38] and, in the latter case, ensure that its sales personnel were registered under the Act as salesmen.

The Act provides that registration must be granted "where in the opinion of the Director [of the OSC] the applicant is suitable for registration and the proposed registration...is not objectionable".[39] The factors considered by the Director in determining what is "suitable" and "not objectionable" have been described as follows:[40]

> [T]he Director has relied upon various standards including an assessment of the applicant's moral character, his knowledge of the securities business and his general competence, a review of his past conduct in the securities field or any other field if relevant and a review of the accuracy of the application form. The past conduct of the applicant has been a particularly important factor in the Director's decision whether to grant registration.

It should also be noted that numerous conditions of registration are prescribed by regulation.[41] For example, applicants are required to complete successfully certain prescribed educational courses, thus ensuring an acceptable minimum level of competence.[42]

In addition to the requirement that, in the absence of an exemption, securities must be traded only through a registered dealer, the *Securities Act* provides that "[n]o person or company shall trade in a security on his own

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[36] Section 34(1) and (2) of the *Securities Act* provides an extensive list of exemptions from the registration requirement. Moreover, as expressly permitted by the Act (s. 34(1)23 and (2)15), further exemptions from the registration requirement are prescribed by regulation (see R.R.O. 1980, Reg. 910, s. 140, as am. by O. Reg. 84/81, s. 2, and O. Reg. 345/87, s. 11). It should be noted, however, that certain exemptions are unavailable to a "market intermediary" (see R.R.O. 1980, Reg. 910, ss. 176 and 178, added by O. Reg. 345/87, s. 13). In addition to these express exemptions, s. 73 of the Act permits the OSC to rule that any trade, intended trade, security, person or company is exempt from the registration requirement.

[37] In this case, the developer need not be registered. Section 34(1)10 of the *Securities Act*, *supra*, note 1, provides that registration is not required in respect of "[a] trade in a security by a person or company acting solely through an agent who is a registered dealer".

[38] Registered dealers are classified into one or more of 10 categories, one of which is a "security issuer", which is defined as "an issuer that is registered for trading in securities for the purpose of distributing securities of its own issue solely for its own account" (R.R.O. 1980, Reg. 910, s. 86.10, as am. by O. Reg. 345/87, s. 4).

[39] *Securities Act*, *supra*, note 1, s. 25(1).

[40] Alboini, *supra*, note 6, §10.2.1, at 10-14 to 10-14.1.

[41] See, generally, R.R.O. 1980, Reg. 910, Part V, as amended.

[42] R.R.O. 1980, Reg. 910, ss. 110 and 111. Section 112, however, permits the Director to exempt an applicant from these requirements where the applicant has equivalent educational qualifications and experience.

account or on behalf of any other person or company...where such trade would be a distribution of such security, unless a preliminary prospectus and a prospectus have been filed and receipts therefor obtained from the Director".[43] Thus, unless an exemption is available,[44] compliance with the prospectus requirement is necessary where any trade in a security would constitute a distribution.

A prospectus must provide "full, true, and plain disclosure of all material facts relating to the securities issued or proposed to be distributed".[45] Moreover, it must comply with the requirements of the Act and regulations, and "contain or be accompanied by such financial statements, reports, or other documents as are required by [the] Act or the regulations".[46]

Where a distribution of securities is made pursuant to a prospectus, the dealer is required to send a copy of the prospectus to a purchaser within two days after accepting an order to purchase,[47] and the purchaser is entitled to rescind the purchase agreement, for any reason, within two days after receipt of the prospectus.[48]

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[43] *Securities Act*, *supra*, note 1, s. 52(1)(b).

[44] Numerous exemptions from the prospectus requirement are provided in the Act (ss. 71 and 72), and in the regulations (R.R.O. 1980, Reg. 910, ss. 14 and 16, as am. by O. Reg. 238/81, s. 1, and O. Reg. 345/87, s. 1(2)). Moreover, as in the case of the registration requirement, discussed *supra*, note 36, s. 73 of the Act permits the Commission to rule that any trade, intended trade, security, person or company is exempt from the prospectus requirement.

It should be noted that, in general, if securities are sold without the filing of a prospectus, pursuant to one of the exemptions contained in s. 71(1) of the Act or ss. 14 or 16 of the regulations, there may be restrictions upon the subsequent resale of the securities. Section 71(4), (5), and (6) of the Act, and s. 17 of the regulations, classify the first trade in securities previously acquired pursuant to most of these exemptions (other than a further exempt trade pursuant to s. 71(1)) as a "distribution". The term "distribution" is defined in s. 1(1)11 of the *Securities Act*, *supra*, note 1. This establishes the so-called "closed system", the effect of which has been described as follows (Alboini, *supra*, note 6, §16.23.3, at 16-68):

> [These sections have] the effect of closing the system of permissible trading in securities previously acquired under the enumerated exemptions to those persons named in the exemptions in s. 71(1)...unless the resale conditions...are met.... If the resale conditions are not met in the case of a proposed trade to a non-qualifying purchaser, the trade is a distribution for which a prospectus is necessary unless the Commission grants a s. 73 ruling upon application by the vendor.

[45] *Securities Act*, *supra*, note 1, s. 55(1). Except as expressly provided, a preliminary prospectus must "substantially comply with the requirements of [the] Act and the regulations respecting the form and content of a prospectus": *ibid.*, s. 53(1).

[46] *Ibid.*, s. 55(1) and (2). With respect to the financial statements that must accompany a prospectus, see R.R.O. 1980, Reg. 910, s. 41.

[47] *Securities Act*, *supra*, note 1, s. 70(1). The obligation to deliver a copy of the prospectus does not apply to a dealer who acts solely as agent of the purchaser: *ibid.*, s. 70(1) and (7).

[48] *Ibid.*, s. 70(2).

The disclosure obligations of the developer do not end with the filing of the prospectus. By filing the prospectus, and obtaining a receipt therefor under the Act, the developer becomes a "reporting issuer",[49] and is subject to the system of timely and continuous disclosure established by Part XVII of the Act.[50] For example, pursuant to section 74, "where a material change occurs in the affairs of a reporting issuer" timely public disclosure must be made of "the nature and substance of the change". In addition, every reporting issuer, other than a mutual fund, must file quarterly interim financial statements,[51] and annual audited financial statements.[52] Moreover, these financial statements must be sent concurrently by the reporting issuer to each holder of its securities, other than to holders of debt instruments.[53]

In addition to the above disclosure requirements, the *Securities Act* provides for the regulation of certain marketing practices that might be relevant to timeshare sales. For example, the OSC has the authority to suspend, cancel, restrict or condition the right to sell securities by telephone call or by personal visit to any residence.[54] The Act also prohibits the making of certain representations, or the giving of certain undertakings, for the purpose of effecting a trade in securities.[55] For example, there is a prohibition against the giving of an undertaking as to the future value or price of the security,[56] and there are certain restrictions upon the making of a representation as to the resale, repurchase, or refunding of the purchase price of a security.[57] Similarly, the Commission may require that the advertising and sales literature of a registered dealer be approved by the Commission in advance of its use.[58] This action, however, is dependent upon the Commission "being satisfied that the registered dealer's past conduct with respect to the use of advertising and sales literature affords reasonable grounds for belief that it is necessary for the protection of the public to do so".[59]

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[49] The term "reporting issuer" is defined *ibid.*, s. 1(1)38.

[50] The OSC has the discretion to grant certain exemptions from these disclosure requirements: *ibid.*, s. 79.

[51] *Ibid.*, s. 76(1). A mutual fund must file an interim financial statement for the first 6 months of the financial year: *ibid.*, s. 76(2).

[52] *Ibid.*, s. 77(1).

[53] *Ibid.*, s. 78.

[54] *Ibid.*, s. 36(1).

[55] *Ibid.*, s. 37.

[56] *Ibid.*, s. 37(2).

[57] *Ibid.*, s. 37(1) and (4).

[58] *Ibid.*, s. 49.

[59] *Ibid.*, s. 49(1).

There is little doubt, therefore, that some of the more blatant abuses of the development and marketing of timeshare projects would be eliminated or curtailed if the *Securities Act* were made clearly to apply.

(c) Problems with the *Securities Act* as a Vehicle for Regulating Timesharing

Notwithstanding the benefits discussed in the preceding section, utilization of the *Securities Act* as the primary statutory device with which to regulate the timeshare industry would not be entirely satisfactory. As noted by the Ministry of Industry and Tourism in response to the 1978 Bill, discussed earlier,[60] fulfillment of the registration and prospectus requirements under the Act is a costly and time-consuming task that might well curtail the development and marketability of timesharing in Ontario. Given that the goal of legislative reform is the implementation of a policy by which to regulate an industry whose basic development is perceived as a desirable phenomenon in terms of consumer demand and economic growth, the overall thrust of any legislative input would be more appropriately facilitative than prohibitory. Accordingly, the classification of timeshare interests as securities might prove to strike a policy balance so far in favour of consumer protection that the industry would be all but eliminated.

The second objection that may be taken to regulation under the *Securities Act* is that, far from embodying over-regulation, the Act fails to address matters that are relevant to timesharing and that seem to demand some statutory policy implementation. For example, nowhere in the *Securities Act* is there a place in which provisions for the management of timeshare developments might appropriately be inserted. Likewise, the Act falls short of any adequate provisions directed at preserving purchasers' rights should a developer become insolvent. Nor, of course, does the Act deal with such issues as partition, or the eventual termination of the timeshare project. Rather, securities regulation is restricted in scope to the initial development, sale, and marketing of the investment in timeshare interests, and was not drafted with a view to regulating the ongoing relationship among purchasers and between purchasers and developers.

Perhaps even more important than these particular shortcomings of the *Securities Act* is the fact that the very classification of timesharing as the type of investment opportunity that might qualify as a security seems to misconstrue the actual nature of the enterprise. To put the matter simply, commentators and observers of the timeshare industry are of the view that timesharing constitutes, first and foremost, a prepaid vacation rather than an investment.[61] The resort location of the project, and the fact that the exchange opportunities with other timeshare owners represents the primary

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[60] See *supra*, note 33 and accompanying text.

[61] See Varner, "Time-Shared Ownership" (1975), 12 Ga. St. B.J. 75, at 78.

motivational factor for most purchasers, combined with the lack of any (or any profitable) secondary market in timeshare interests, effectively distinguish this type of purchase from one that conforms to the *Howey*, the "risk capital", or the broad de Grandpré J. definitions of an investment contract. Thus, although the Act could certainly be amended to capture timeshare interests expressly, the policy thrust of securities regulation would thereby be either misapplied or significantly changed.

2. *CONDOMINIUM ACT*

(a) Relevance of Condominium Legislation to Timesharing

While it may be theoretically possible to create a condominium-like development in Ontario outside the *Condominium Act*,[62] for all practical purposes condominiums in this Province are governed by that statute. Accordingly, although the Act makes no express mention of timesharing, in the usual case a timeshare development that is of a condominium nature will be subject to its provisions. As a result, in order for a timeshare purchaser to acquire fee ownership of his individual unit directly from the developer, the timeshare project must comply with the *Condominium Act*.[63] Appurtenant to each unit is an undivided interest in the common elements, which the unit owners hold as tenants in common.[64]

In order to create a condominium, the developer is required under the Act to register both a declaration and a description of the project.[65] Section 4(2) of the Act provides that a "description shall not be registered unless it has been approved in accordance with the regulations". Under section 10 of the regulations,[66] a description must be submitted for approval to an examiner of surveys.[67]

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[62] R.S.O. 1980, c. 84.

[63] The *Condominium Act* no longer requires that a condominium-like development must be created only under the Act. With respect to the former position under the Act, see Burns and McLellan, *Condominium*[:]*The Law and Administration in Ontario* (1981), at 6, who cite s. 60 of the *Condominium Act*. Section 60 has been repealed by s. 7 of the *Residential Complex Sales Representation Act, 1983*, S.O. 1983, c. 67, described *infra*, this ch., sec. 3(a).

[64] *Condominium Act*, *supra*, note 62, s. 7(1) and (2). Concerning exclusive ownership and use of the unit, see s. 6(2).

[65] *Ibid.*, s. 2(4).

[66] R.R.O. 1980, Reg. 122.

[67] An examiner of surveys, of the Legal and Survey Standards Branch of the Ministry of Consumer and Commercial Relations, is appointed pursuant to s. 13 of the *Land Titles Act*, R.S.O. 1980, c. 230.

When the description is submitted, it must be accompanied by a copy of the proposed declaration.[68] The declaration cannot be registered unless it complies with section 3(1) of the Act. This section provides that the declaration must contain:

> (a) a statement of intention that the land and interests appurtenant to the land described in the description be governed by this Act;
>
> (b) the consent, in the prescribed form, of every person having a registered mortgage against the land or interests appurtenant to the land described in the description;
>
> (c) a statement, expressed in percentages, of the proportions of the common interests;
>
> (d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expenses;
>
> (e) an address for service and a mailing address for the corporation;[69] and
>
> (f) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners.

Despite this relatively detailed list, it would seem that the review of the declaration is rather cursory. Typically, a limited review is conducted in order to ensure that the terms set out therein comply with the requirements of section 3(1), but generally there will not be a "review [of] the remainder of the declaration with a view to assessing its accuracy or consistency".[70]

The description that must be registered along with the declaration deals with the physical plans of the development rather than with administrative and managerial matters. The contents of a description are set forth in section 4(1) of the Act.

Before approval of the document is issued, the examiner of surveys checks the submitted plans against any surveys of surrounding lands "to see that the structural plans agree and to ensure that the description and the declaration coincide".[71] In addition, the regulations under the Act require that an on-site inspection be conducted in order to ensure that the buildings depicted in the description have been completed in accordance with the

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[68] See, further, R.R.O. 1980, Reg. 121, s. 2(c).

[69] See *infra*, this sec., concerning the condominium corporation.

[70] Burns and McLellan, *supra*, note 63, at 17. Section 3(3) provides that a declaration may, but is not required to, contain certain terms additional to those set out in s. 3(1).

[71] Burns and McLellan, *supra*, note 63, at 17.

submitted plans.[72] Finally, the description must be approved by the Minister of Municipal Affairs.[73]

Under section 10(1) of the Act, "[t]he registration of a declaration and description creates a corporation without share capital whose members are the owners [of the units and of an interest in the common elements] from time to time". Upon registration, the condominium corporation is entered in the Condominium Corporation Index and in the Condominium Register, in which is collected, in a number of separate Registers and Indexes, information relating to such matters as the history of title prior to registration of the declaration and description, the current declaration and description, the by-laws of the condominium corporation, and any other instrument that is relevant to all the units or the common elements.[74]

Insofar as the registration of freehold condominium timeshare interests is concerned, as an administrative convenience land titles officials in Huntsville and Barrie have been permitted to amend the traditional Unit Index to include a chart of weeks of the year, which enables a purchaser to check if her particular possessory week has any registrations against it. It must be emphasized that this accommodation is by no means province-wide or statutorily mandated. However, we understand that permission may be sought to amend the Unit Register in a similar fashion where a condominium is registered under the *Registry Act*.[75]

The Act contains a number of sections dealing with the termination of a condominium development. Specifically, section 42(2) provides as follows:

> 42.—(2) Where there has been a determination that there has been substantial damage to 25 per cent of the buildings, the corporation shall repair within a reasonable time, unless, within sixty days after the determination made under subsection (1), by a vote of owners who own 80 per cent of the units, the owners vote for termination.

Additionally, the Act provides that the condominium corporation, any unit owner, or any "person having an encumbrance against a unit and common interest" may apply to the Supreme Court of Ontario for an order terminating the condominium development.[76] As might be expected, the judicial

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[72] *Condominium Act*, *supra*, note 62, s. 4(1)(e), and R.R.O. 1980, Reg. 122, s. 6a, added by O. Reg. 133/81, s. 1.

[73] *Condominium Act*, *supra*, note 62, s. 50(2). Although s. 50(2) refers to the Minister of Housing, the reference now should be to the Minister of Municipal Affairs: see O. Reg. 375/85.

Concerning the possible role in the approval process of a regional municipality, see Burns and McLellan, *supra*, note 63, at 15.

[74] Burns and McLellan, *ibid.*, at 19.

[75] R.S.O. 1980, c. 445.

[76] *Condominium Act*, *supra*, note 62, s. 46(1). Section 47 deals generally with the distribution of assets upon termination of the condominium development.

capacity to make such an order is not stated in the absolute; rather, under section 46(2) it is made discretionary, depending upon the court's "opinion that the termination would be just and equitable", having regard to the following matters:

> (a) the scheme and intent of this Act;
>
> (b) the probability of unfairness to one or more owners if termination is not ordered; and
>
> (c) the probability of confusion and uncertainty in the affairs of the corporation or the owners if termination is not ordered.

Finally, the Act provides that, "[e]xcept as provided by this Act, the common elements shall not be partitioned or divided".[77]

As with the *Securities Act*, the *Condominium Act* is premised on a philosophy of full disclosure. Thus, the relevant regulatory bodies do not pass on the merits of a particular project or offering, but rather operate on the presumption that prospective purchasers will be protected if full disclosure of all relevant information is enforced. In the condominium context, an agreement of purchase and sale between a purchaser of a unit for residential purposes and a developer is not binding on the purchaser until the developer has delivered to him a copy of the current disclosure statement.[78] This statement must "contain and fully and accurately disclose" the following:[79]

> (a) the name and municipal address of the declarant or proposed declarant and of the property or proposed property;
>
> (b) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with any conditions that apply to the provision of amenities;
>
> (c) the portion of units or proposed units which the declarant or proposed declarant intends to market in blocks of units to investors;
>
> (d) a brief narrative description of the significant features of the existing or proposed declaration, by-laws and rules governing the use of common elements and units, and of any contracts or leases that may be subject to termination or expiration under section 39;
>
> (e) a budget statement for the one year period immediately following the registration of the declaration and the description;
>
> (f) where construction of amenities is not completed, a schedule of the proposed commencement and completion dates; and

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[77] *Ibid.*, s. 7(6).

[78] *Ibid.*, s. 52(1).

[79] *Ibid.*, s. 52(6).

(g) any other matters required by the regulations to be disclosed.

The practice with respect to the sale of timeshare condominium units seems to be that developers append to the disclosure statement a copy of the timeshare agreement and the management agreement to which the purchaser will be a party.

The consumer protection provisions of the *Condominium Act* are subject to private enforcement through a number of remedial mechanisms. For example, section 52(5) of the Act provides as follows:

> 52.—(5) Where any statement or material required under this Act to be provided by a declarant or proposed declarant to a purchaser of a unit or proposed unit for residential purposes contains any material statement or information that is false, deceptive or misleading or fails to contain any material statement or information, the corporation or any unit owner who relied on such statement or material is entitled, as against the declarant or the proposed declarant to damages for any loss sustained as a result of such reliance.

Accordingly, purchasers can vindicate their rights against the developer either collectively, through the condominium corporation, or as individuals.

In addition, the Act provides[80] that the "purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment".[81] The right of rescission may be exercised without the purchaser showing cause, and, upon rescission, the purchaser is entitled to a refund of all payments toward purchase of the condominium that have been made to date.[82] Moreover, where the developer, as required by statute, has deposited in a trust account all payments received from purchasers prior to registration of the declaration and description, and where the agreement of purchase and sale has been terminated and the purchaser is entitled to the return of any money paid under the agreement, the developer must pay to the purchaser interest on such money.[83]

The Act also contains a further consumer protection provision in the form of a section expressly authorizing the condominium corporation to

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[80] *Ibid.*, s. 52(2). See, also, s. 52(3).

[81] However, we understand that lawyers practising in this area generally interpret this section as giving the purchaser a right to rescind the agreement within ten days of the later of the date the agreement is signed and the date of receipt of the disclosure statement or any material amendment of it.

[82] *Ibid.*, s. 52(4).

[83] *Ibid.*, s. 53(1) and (2).

bring an action on its own behalf, or on behalf of individual unit owners, for damage to the common elements or to the individual units.[84]

The final series of specifications that would apply to a condominium type of timeshare are those pertaining to the management and operation of the development. In this connection, section 12 provides as follows:

> 12.—(1) The objects of the corporation are to manage the property and any assets of the corporation.
>
> (2) The corporation has a duty to control, manage and administer the common elements and the assets of the condominium corporation.
>
> (3) The corporation has a duty to effect compliance by the owners with this Act, the declaration, the by-laws and the rules.
>
> (4) The declaration or the by-laws may specify duties of the corporation consistent with its objects, responsibilities and duties.
>
> (5) Each owner and each person having a registered mortgage against a unit and common interest has the right to the performance of any duty of the corporation specified by this Act, the declaration, the by-laws and the rules.

With respect to securing compliance with the Act, the declaration, the by-laws, or the rules, as the case may be, reference should be made to section 31:

> 31.—(1) Each owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.
>
> (2) Each owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.
>
> (3) The corporation, and every person having an encumbrance against any unit and common interest, has a right to the compliance by the owners with this Act, the declaration, the by-laws and the rules.
>
> (4) Each person in occupation of a proposed unit is bound by and shall comply with the rules proposed by the proposed declarant where those rules are reasonable and consistent with this Act.
>
> (5) Each person in occupation of a proposed unit has a right to the compliance by every other occupant of a proposed unit with the rules proposed by the proposed declarant.
>
> (6) The proposed declarant has a duty, until registration of the declaration and description, to effect compliance by occupiers of proposed units with the rules proposed by the declarant.

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[84] *Ibid.*, s. 14.

Managerial responsibilities are delegated to a board of directors,[85] who are required to exercise their powers and discharge their duties honestly and in good faith.[86] The board may pass by-laws in respect of certain matters,[87] although such by-laws are not effective until confirmed by unit owners owning not less than fifty-one percent of the units and registered on title.[88] In addition, the board may make rules respecting the use of the common elements and units and the prevention of unreasonable interference with the use and enjoyment of such common elements and units.[89] Under the Act, owners are given an opportunity to reject a proposed rule [90] or to amend or repeal an existing rule.[91] The rules may be enforced in the same manner as the by-laws.[92]

The responsibilities of the board of directors are, therefore, rather extensive, and incorporate budgeting and daily managing as well as long term planning and administration of a "reserve fund" that is "set up by the corporation in a special account for major repair and replacement of common elements and assets of the corporation".[93] It should be noted, however, that although the board is given substantial discretion over management and ordinary budgetary matters, unit owners are statutorily entitled to exercise their voting rights on a number of issues, such as amendments to the declaration[94] and, as we have seen, the confirmation of by-laws and the rejection, amendment, or repeal of rules.[95] Similarly, the board of directors cannot, in the absence of owner confirmation, bring about substantial modifications to the common elements,[96] or terminate the condominium corporation.[97]

Finally, section 61 of the Act provides that the Act "applies notwithstanding any agreement to the contrary".

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[85] *Ibid.*, s. 15(1).

[86] *Ibid.*, s. 24(1).

[87] *Ibid.*, s. 28(1).

[88] *Ibid.*, s. 28(2) and (5).

[89] *Ibid.*, s. 29(1).

[90] *Ibid.*, s. 29(4) and (5).

[91] *Ibid.*, s. 29(6).

[92] *Ibid.*, s. 29(3). See s. 12(3) and (5), reproduced *supra*, this sec.

[93] *Ibid.*, s. 36(1). See, also, s. 36(2). For a more detailed description of the board's responsibilities, see Burns and McLellan, *supra*, note 63, at 129 *et seq.*

[94] *Condominium Act*, *supra*, note 62, s. 3(4). All unit owners and all persons with registered mortgages must consent.

[95] *Ibid.*, ss. 28(2) and 29(4), (5), and (6).

[96] *Ibid.*, s. 38. Substantial modifications require a vote of owners who own at least 80% of the units.

[97] *Ibid.*, ss. 42-45.

(b) Problems with the *Condominium Act* as a Vehicle for Regulating Timesharing

As is evident, the *Condominium Act* would provide a number of advantages if utilized as the statutory device by which to govern timeshare developments. Not the least of these is the fact that the Act provides an existing legislative framework enabling a developer to give title to airspace along with real property, and that, in addition to providing a mechanism for the sharing of common expenses, sets out in detailed form the rights and responsibilities of each purchaser. As discussed above, condominium legislation also contains a variety of consumer protection provisions that would be relevant to timeshare marketing. Nevertheless, the Act has certain shortcomings when applied to the timeshare context, which, on the whole, tend to militate against its expansion to cover all types of timeshare interest.

The gaps in the existing condominium legislation that would have to be filled in order for it to be appropriate to the timeshare industry can be listed briefly. First, the Act does not provide for the regulation of marketing practices, but rather, by its silence on these issues, relegates this function to other statutory devices, such as the *Real Estate and Business Brokers Act*,[98] that pertain to real property transactions generally. Secondly, the *Condominium Act* was structured primarily to regulate and facilitate the sale of freehold interests only. Indeed, the Act specifically precludes a developer from granting leases of units except subject to certain conditions and, in no case, for a period longer than two years, including renewals.[99] As has been seen throughout this Report, not all timeshare interests are structured as freehold estates. In fact, it would seem that the majority of such interests take the form of contractual rights of one sort or another or combine freehold with non-freehold interests.

The gaps in condominium legislation amount, in the aggregate, to a substantial lack of protection for many timeshare purchasers. In the United States, the fact that statutes governing condominium developments embody a policy thrust and cover a range of subjects that differ significantly from that required by the timeshare phenomenon has led most state legislatures that have considered the question to enact comprehensive timeshare legislation in order to keep the two concepts distinct. Not only do most observers and commentators agree that condominium legislation is an inadequate vehicle with which to structure a regulatory scheme for timesharing,[100] but the American National Conference of Commissioners on Uniform State Laws, which initially proposed to include provisions dealing with timesharing within the purview of the Uniform Condominium Act, has concluded

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[98] R.S.O. 1980, c. 431. See the discussion of this statute, *infra*, this ch., sec. 3(b)(i).

[99] *Condominium Act*, *supra*, note 62, s. 54(1) and (4).

[100] See, for example, Johnakin, "Legislation for Time Share Ownership Projects" (1975), 10 Real Prop. Prob. & Tr. J. 606, at 610, and Pollack, "Time-Sharing, or Time Is Money But Will it Sell?" (1982), 10 Real Est. L.J. 281, at 295.

that, since timeshare interests potentially differ so widely from condominium ownership, separate legislation for each is required.[101]

It would seem that the inclusion of right-to-use and other non-condominium arrangements in the Ontario *Condominium Act* would, as generally concluded in the United States, so significantly alter the character of the existing legislation as to make it confusing at best, and potentially problematic for the regulation of both timesharing and conventional condominium developments. Although these two forms of development are not distant from each other in substance, there would seem to be no strong argument in favour of increasing the complexity of the regulatory scheme by attempting to house the two similar, but not identical, arrangements under a single statutory roof.

3. OTHER PROVINCIAL AND FEDERAL STATUTES

(a) *Residential Complex Sales Representation Act, 1983*

One provincial statute that potentially touches on all timeshare sales is the *Residential Complex Sales Representation Act, 1983*[102] (RCSRA). Section 2(1) of the Act, which superseded section 60 of the *Condominium Act*,[103] prohibits anyone from selling or offering to sell "an interest in respect of a residential complex to a purchaser who is led to believe" that, "along with the interest, he is acquiring the present or future right to occupy a dwelling unit in the residential complex", or "that he is acquiring exclusive ownership of a dwelling unit[104] in the residential complex if that is not the case".[105] Moreover, section 2(2) of the Act provides that "[n]o person shall advertise, by any means, an interest for sale that would, if the sale were completed, be in contravention of subsection (1)". However, section 2(5) provides that "[a] person is not in contravention of subsection (1) simply

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[101] See National Conference of Commissioners on Uniform State Laws, Uniform Condominium Act, Uniform Laws Annotated, Vol. 7, and Model Real Estate Time-Share Act, Uniform Laws Annotated, Vol. 7B.

[102] *Supra*, note 63.

[103] *Supra*, note 62. Section 60 was repealed by s. 7 of the RCSRA.

[104] With respect to the acquisition of exclusive ownership of a particular time period in a unit by a timeshare purchaser, see *supra*, ch. 2, sec. 1(a)(iii).

[105] The term "residential complex" is defined in s. 1(e) of the RCSRA, *supra*, note 63, as "a building or related group of buildings situated in Ontario in which more than six dwelling units are located and a mobile home park as defined in Part IV of the *Landlord and Tenant Act*".

See, also, s. 2(4) of the Act:

> 2.—(4) For the purpose of subsection (1), a person shall be deemed to be led to believe that he is acquiring the right to occupy a dwelling unit where he is led, expressly or by implication, by written or oral statements, to understand that he may occupy or acquire the right to occupy a dwelling unit.

because he sets out a clear, accurate, written statement of law in respect of the right to occupy the unit". The only exceptions[106] to these blanket prohibitions are for a sale, offer to sell, or advertisement for sale of

> (a) an interest in a residential complex to a purchaser who acquires or will acquire the right to occupy a dwelling unit that,
>
> (i) the vendor occupies, or
>
> (ii) is exempted by the regulations;
>
> (b) a unit or proposed unit as defined in the *Condominium Act*;[107] or
>
> (c) a security issued by a corporation to which the *Co-operative Corporations Act*[108] applies.

Section 4 of the Act deals with the rights of a purchaser where the vendor contravenes section 2(1):

> 4. Every offer to purchase or agreement of purchase that is in contravention of subsection 2(1) is voidable, up to the time the transaction is complete, at the option of the purchaser and the purchaser, whether he exercises his option or not, may claim damages from the vendor or any person who acted in the transaction as agent for the vendor in contravention of section 2.

In addition to the civil remedies contained in section 4, section 5 provides that any person who contravenes any provision of the Act is guilty of an offence and, on conviction, liable to a fine or imprisonment, or both, or, if such person is a corporation, to a fine.

It would appear that the policy of this statute is to protect those who are misled into believing that they have purchased a specific unit in a residential building, with the automatic right to occupy that unit, when they have in fact acquired only an interest in the building itself. As a result of a misrepresentation made by the vendor or the vendor's agent, such persons frequently assume that they are buying a condominium unit. The problem is brought to a head where the purchasers are met with existing tenants of the building, who enjoy the right to retain possession of their premises.[109]

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[106] *Ibid.*, s. 3(a), (b), and (c).

[107] *Supra*, note 62. See *supra*, this ch., sec. 2.

[108] *Co-operative Corporations Act*, R.S.O. 1980, c. 91. See *infra*, this ch., sec. 3(f).

[109] See Legislative Assembly of Ontario, *Hansard, Official Report of Debates*, November 9, 1983, at 2940-41. In the course of the debate, it was said that, "in recent years some rental apartment building owners have introduced complicated conveyancing schemes that were apparently intended to skirt condominium conversion controls" (*ibid.*, at 2940).

With respect to the right of tenants to retain possession, see *Landlord and Tenant Amendment Act, 1983*, S.O. 1983, c. 24, referred to in the Legislative Assembly debates (at 2941).

The RCSRA may be described essentially as disclosure legislation, designed to protect those who labour under a misconception concerning what they have purchased. Section 2(5) of the Act makes it clear that the prohibitions in the Act do not apply where the purchaser is fully informed in writing as to the precise interest that has been acquired.

In the timeshare context, an important matter of statutory interpretation arises as a result of the applicability of the Act to a "residential" complex. Having regard to the use of this term and to the apparent purpose of the Act, as described above, it may well be arguable that timeshare developments, which are used as vacation properties, are not covered by the statute.

Although the term "residence" is used in different ways for different purposes, it is most frequently used to describe generally a place of permanent, even if not exclusive, abode. It is often referred to as a home, where one sleeps, and is distinguished from mere places of temporary occupation.[110] Moreover, it is not uncommon for legislation to differentiate between land or premises used for residential purposes and land or premises used for vacation or recreational purposes.[111] For these reasons, therefore, at least some doubt may be cast on whether the RCSRA comprehends any type of timeshare development.[112]

A further question of statutory interpretation arises with respect to the applicability of the phrase "an interest *in respect of* a residential complex"[113] to right-to-use timeshare interests. While it is clear that the phrase would comprehend both freehold and co-operative timeshare interests, a timeshare interest characterized as a licence or a club membership may or may not fall within the scope of the statutory prohibitions. Certainly, there is ample case law to establish that licences convey purely contractual possessory rights, and therefore do not constitute or create an interest in real property.[114] However, the statutory terminology may well circumvent the traditional doctrinal distinction between contractual rights and proprietary

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[110] See, for example, the definition in *Black's Law Dictionary* (5th ed., 1979), and the commentary in Saunders (ed.), *Words and Phrases Legally Defined*, Vol. 4 (1969), at 318-25.

[111] See, for example, the regulations passed in light of s. 1(c)(iv) of the *Landlord and Tenant Act*, R.S.O. 1980, c. 232: R.R.O. 1980, Reg. 547, s. 2.2 (dealing with a "vacation home"). See, also, the definition of "recreational land" under s. 1(1)(i) of the *Land Transfer Tax Act*, R.S.O. 1980, c. 231.

[112] The Ministry of Consumer and Commercial Relations has indicated that timesharing was not a subject to which the drafters of the RCSRA turned their minds: interview with Ms. Ilsa Fischke, Quality Control Coordinator, Property Law Branch, Registration Division, Ministry of Consumer and Commercial Relations (March 18, 1988).

[113] *Residential Complex Sales Representation Act, 1983*, *supra*, note 63, s. 2(1).

[114] See, for example, *Street v. Mountford*, [1985] A.C. 809, [1985] 2 W.L.R. 877 (H.L.), and *Metro-Matic Services v. Hulmann* (1973), 4 O.R. (2d) 462, 48 D.L.R. (3d) 326 (C.A.).

interests. While the phrase "interest in respect of" (rather than "interest in") may have been utilized by the Legislature in order to reinforce the point that the RCSRA applies to shares in co-operative-like corporations as well as to direct interests in real property, the language is arguably broad enough to encompass licences and other contractual devices in which the purchaser acquires some possessory right. Certainly, until the scope of section 2(1) of the RCSRA has been adjudicated, this interpretation of the prohibitory language cannot be discounted.

(b) Consumer Protection Legislation

(i) *Real Estate and Business Brokers Act*

The *Real Estate and Business Brokers Act*[115] (REBBA) governs sale or lease transactions in two broad contexts. First, the *Ministry of Consumer and Commercial Relations Act*[116] provides that the Minister of Consumer and Commercial Relations is responsible for the administration of the REBBA, under which a Registrar of Real Estate and Business Brokers[117] is created. Persons who "trade"[118] in "real estate"[119]—that is, brokers and their salesmen—must register under the Act as a broker or salesman and must comply with the Act and with the regulations[120] passed pursuant to it.[121] So, too, must any person who acts on behalf of a corporation or partnership "in connection with a trade in real estate", as well as the corporation or partnership itself.[122] Secondly, insofar as foreign timeshare sales are concerned, the REBBA is explicitly made applicable, by sections 37-46 of the Act, to "Trading in Subdivision Lots outside of Ontario". The Business Practices Division of the Ministry of Consumer and Commercial Relations governs the administration of these sections, and its officials have expressed the view that this part of the Act is applicable to certain forms of timeshare agreement.[123]

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[115] *Supra*, note 98.

[116] R.S.O. 1980, c. 274, ss. 1(e) and 4.12.

[117] *Real Estate and Business Brokers Act*, *supra*, note 98, s. 2.

[118] "Trade" is defined in s. 1(n) of the Act, *ibid.*

[119] *Ibid.*, s. 1(i). "Real estate" includes "real property, leasehold and business whether with or without premises...".

[120] R.R.O. 1980, Reg. 891. Regulations are made by the Lieutenant Governor in Council pursuant to s. 52 of the *Real Estate and Business Brokers Act*, *supra*, note 98.

[121] *Ibid.*, s. 3(1)(a) and (b).

[122] *Ibid.*, s. 3(1)(c).

[123] Directive from Mr. J.R. Cook, Assistant Registrar of Real Estate and Business Brokers, Business Practices Division, Ministry of Consumer and Commercial Relations (July 28, 1982).

Consequently, a timeshare developer in Ontario who, on its own behalf,[124] sells any form of timeshare interest other than a purely contractual right-to-use interest, is required to register as, and act through, a registered broker. As a result, the developer's marketing techniques may be scrutinized by the Registrar. Every registered broker is required to keep a trade record sheet that documents, among other things, the nature of the trade, a description of the real estate involved, the names of all parties to the trade, and other financial data.[125] At the Registrar's discretion, a broker may also be required to file a financial statement indicating any pertinent matters that the Registrar may specify.[126]

In addition, the REBBA provides a system of investigation that is designed to ensure compliance with the statutory and regulatory provisions. By way of illustration, where the Registrar receives a complaint in respect of a broker, the broker is required to furnish the Registrar with whatever information in respect of the matter is required by the Registrar.[127] Additionally, as part of the investigation of the complaint, the Registrar or his delegate may conduct an inspection of the broker's business premises.[128] Regardless of whether there has been a complaint, officials from the Registrar's office may inspect a broker's business premises to ensure compliance with the provisions of the Act and the regulations relating to registration, the maintenance of trust accounts, and the regulation of trades.[129] In the course of any inspection, the person inspecting the premises is entitled to free access to all relevant records and documents, and the statute specifies that "no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required...for the purposes of the inspection".[130]

The Minister may also "appoint a person to make an investigation into any matter to which [the] Act applies" and the person appointed to make such an investigation has the powers of a commission under Part II of the *Public Inquiries Act*.[131] Finally, the Director of the Business Practices Division of the Ministry of Consumer and Commercial Relations may order an investigation where he believes on reasonable and probable grounds that any person has, for example, contravened the Act or

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[124] Assuming that the developer is a corporation or partnership: see *Real Estate and Business Brokers Act*, *supra*, note 98, s. 3(1)(c).

[125] *Ibid.*, s. 19(1).

[126] *Ibid.*, s. 21(4).

[127] *Ibid.*, s. 11(1).

[128] *Ibid.*, s. 11(3).

[129] *Ibid.*, s. 12(1).

[130] *Ibid.*, s. 13(1).

[131] *Ibid.*, s. 14. See *Public Inquiries Act*, R.S.O. 1980, c. 411.

regulations.[132] The person conducting the investigation also has the full powers of a commission under the *Public Inquiries Act*. Thus, where the sale of timeshare interests through a third party is of a freehold or leasehold estate, and the actual property is located in Ontario, the consumer is afforded a substantial degree of protection against abusive marketing practices.

Ironically, potential purchasers would seem to be afforded an even higher level of protection with regard to the marketing in Ontario of foreign timeshare projects.[133] The REBBA is made expressly applicable to all land outside Ontario that is divided or proposed to be divided into five or more lots or other units for the purpose of sale or lease to customers in Ontario.[134] The Assistant Registrar of Real Estate and Business Brokers has widened the category of transactions subject to regulation under the Act to include foreign timeshare interests issued on other than a freehold or leasehold basis. In a directive dated July 2, 1982, the Assistant Registrar stated the Ministry's internal policy as follows:[135]

> Registration is required of time-sharing projects where the document given to the public is a recognizable real estate document (deed, lease, etc.). There are, however, time-sharing operations which presently give the general public, membership in a 'club'. All payments are made to the club, and membership in the club carries with it certain privileges, one of which is the use of a unit in a building during the period of the year. It has been considered by this Ministry that, should the offer to the public be of a specific unit, in a specific building for a specific period of time each year, then that is the same as a 'lease' and therefore would require registration in accordance with the attached.

As a consequence, all foreign timeshare interests that refer to a specific unit in a specific building for a specific period of time (that is, all of the typical timeshare arrangements except those issued on a "floating" basis with respect to the premises or the time of year) must comply with the regulatory policies administered by the Registrar for all marketing pursued within the Province.

Developers are forbidden to engage in public advertising for the sale of lots outside Ontario without the approval of the Registrar.[136] Before any trading in foreign timeshare units in Ontario is carried on, a prospectus must be filed with the Registrar, from whom a certificate of acceptance must be obtained.[137] A copy of the prospectus must be delivered to the purchaser

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[132] *Real Estate and Business Brokers Act*, *supra*, note 98, s. 15.

[133] *Ibid.*, ss. 37-46.

[134] *Ibid.*, ss. 37 and 38.

[135] *Supra*, note 123.

[136] *Real Estate and Business Brokers Act*, *supra*, note 98, s. 45.

[137] *Ibid.*, s. 38(1).

or tenant,[138] and its receipt must be acknowledged in writing by the purchaser or tenant.[139] If the developer has not complied with these requirements, the purchaser or tenant is entitled by statute to rescind the contract of purchase and sale or the lease.[140] Section 40 of the Act specifies that the prospectus must be accompanied by the following documentation:

> (a) an affidavit of the owner of the subdivision or, where the owner is a corporation, any three directors thereof, as to the correctness of every matter of fact stated in the prospectus;
>
> (b) a copy of every plan referred to in the prospectus;
>
> (c) a copy of every form of contract referred to in the prospectus;
>
> (d) such documents as the Registrar may require to support any statement of fact, proposal or estimate set out in the prospectus;
>
> (e) such financial particulars of the owner as the Registrar may require; and
>
> (f) the prescribed fees.

In addition to the statutory requirements regarding the prospectus, regulations passed under the REBBA elaborate upon the type of information that the Registrar will require in the prospectus. Thus, the developer must provide a legal description of the project and particulars of the following factors: the state of the title; all encumbrances and provisions to be made for their discharge; the manner in which any plan of subdivision has been filed with the appropriate land registry or similar office; the arrangements to govern the handling of deposits and other monies received from purchasers; existing public utility services; financing plans; any drainage problems and solutions proposed; any arrangements that have been made or are planned with respect to building contractors for the project; and, finally, in the case of condominium units, such other particulars as the Registrar may require.[141] Under the Act, the Registrar cannot grant a certificate of acceptance of the prospectus in any one of the following situations:[142]

> (a) the prospectus contains any statement, promise or forecast that is misleading, false or deceptive, or has the effect of concealing material facts;

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[138] *Ibid.*, s. 39(1)(a).

[139] *Ibid.*, s. 39(1)(b).

[140] *Ibid.*, s. 39(3)(a).

[141] *Supra*, note 120, s. 22.

[142] *Real Estate and Business Brokers Act*, *supra*, note 98, s. 41.

(b) adequate provision has not been made for the protection of deposits or other funds of purchasers or for assurance of title or other interest contracted for;

(c) the prospectus fails to comply in any substantial respect with any of the requirements prescribed;

(d) the requirements of section 40 have not been complied with in any substantial respect;

(e) the proposed methods of offering do not accord with standard real estate practices in Ontario.

The Registrar is also empowered to conduct his own inquiries into whether a certificate of acceptance should be issued, which may include an examination of the project, and a requisitioning of reports from the appropriate public authorities of the jurisdiction in which the project is located.[143] The "reasonable and proper costs of such inquiries or reports" are to be borne by the party filing the prospectus.[144] Additionally, if, after the process of filing and acceptance is complete, one of the situations described above occurs, and that situation would have resulted in an initial refusal to issue a certificate of acceptance, the Registrar may revoke the certificate and order that trading cease forthwith.[145] However, if the Registrar refuses to grant a certificate of acceptance of the prospectus or revokes a certificate, the developer is entitled to a hearing before the Commercial Registration Appeal Tribunal.[146]

After dealing with the trading in real estate located outside Ontario, the Act provides for several enforcement mechanisms of more general applicability. For instance, if the Registrar believes, on reasonable and probable grounds, that a broker is making false, misleading, or deceptive statements in an advertisement, circular, pamphlet, or similar material, the immediate cessation of the use of these materials may be ordered.[147] As with the filing of a prospectus, however, an adverse decision of this type may be appealed to the Commercial Registration Appeal Tribunal.[148] The Director of the Business Practices Division may also apply to the High Court of Justice to obtain an order for compliance against any person who does not comply with the Act, regulations, or an order made under the Act.[149] In addition, the

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[143] *Ibid.*, s. 42(1).

[144] *Ibid.*, s. 42(2).

[145] *Ibid.*, s. 43(2).

[146] *Ibid.*, s. 43(1) and (3).

[147] *Ibid.*, s. 47.

[148] *Ibid.*

[149] *Ibid.*, s. 49.

REBBA specifies penal sanctions against any person who knowingly furnishes false information or fails to comply with any order, direction, or other requirement made under the Act, or, indeed, contravenes any provision of the Act or regulations.[150] The stipulated penalties range up to a maximum fine of $2,000 or one year's imprisonment,[151] or both, or, if a corporation is convicted, a fine of up to $25,000.[152]

Officials within the Office of the Registrar of Real Estate and Business Brokers, Business Practices Division, have indicated that, in their experience, the comprehensive system of consumer safeguards contained in the REBBA with respect to the marketing of foreign subdivisions has adequately controlled the sale or lease of foreign timeshare interests in Ontario.[153] As indicated, the statute provides that any timeshare interests structured on a freehold or leasehold basis inside or outside of Ontario are governed by the Act, and the regulations extend this to purely contractual interests in foreign timeshare projects marketed to Ontario purchasers. Thus, the only visible gaps in the regulation of sales practices and personnel under the REBBA are with respect to contractual right-to-use interests in timeshare projects located in Ontario, and floating timeshare interests in foreign timeshare projects sold on a licence or club basis to Ontario purchasers. As is evident, this latter gap with respect to foreign timeshare projects represents a relatively narrow segment of the timeshare market, and is a small loophole in an otherwise extensive regulatory net cast over the sale of foreign timeshare interests to Ontario consumers.

For some reason, however, the regulatory policy with respect to projects located in the Province is more *laissez-faire*. Contractual interests are excluded from the statutory provisions, thus exempting a substantial portion of the timeshare market from any of the restrictions generally pertaining to real estate personnel, and no prospectus or other extended requirements exist as a parallel to those pertaining to foreign timeshare developments. This regulatory imbalance is perhaps, in and of itself, a strong argument for a comprehensive legislative package designed with all types of timeshare interest in mind.

(ii) *Business Practices Act*

The *Business Practices Act*[154] (BPA) is a comprehensive piece of consumer protection legislation that enumerates a list of specific examples

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[150] *Ibid.*, s. 50(1).

[151] *Ibid.*

[152] *Ibid.*, s. 50(2).

[153] Interview with Mr. J.R. Cook, Assistant Registrar of Real Estate and Business Brokers, Business Practices Division, Ministry of Consumer and Commercial Relations (July 24, 1986).

[154] R.S.O. 1980, c. 55.

of "unfair" business practices.[155] In certain cases, the Act provides a right of rescission or, where this is not possible, monetary compensation, where a consumer has been induced to enter into a written, oral, or implied agreement by a consumer representation that is an unfair practice.[156] The Act may be enforced, for example, by means of compliance orders or written assurances of voluntary compliance (AVC's). In addition, investigations may be undertaken into matters to which the Act applies.[157] As an ultimate remedial measure, certain penal sanctions for contravention of its provisions are specified.[158]

The applicability of the BPA specifically to the sale or lease of timeshare interests, however, is uncertain. The Act refers throughout to all "consumer" transactions involving "goods and services". "Goods" is defined to mean "chattels personal or any right or interest therein other than things in action and money", but does not include securities as defined in the *Securities Act*.[159] Thus, as a preliminary matter, the entire applicability of the BPA would seem to turn on the view taken by the Ontario Securities Commission (OSC), and, of course, the courts, of the scope of the definition of "security" under the *Securities Act*. Assuming that timeshare interests will continue to be perceived as lying outside OSC jurisdiction, such interests that are sold as licences or club memberships may be thought to fall into the category of "goods" as defined in the BPA. However, it should be noted that the term "goods" is defined as encompassing only "chattels personal or any right or interest therein other than things in action and money",[160] thereby making it extremely unlikely that such purely contractual phenomena as licences and club memberships will be held to be within its ambit.

On the other hand, it may be argued that transactions involving timeshare interests, whether right-to-use or fee, would be governed by the BPA insofar as such interests could fall into the category of "services", which is defined, in part, as follows:[161]

> (i) 'services' means services
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> (i) provided in respect of goods or of real property, or
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> (ii) provided for social, recreational or self-improvement purposes....

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[155] *Ibid.*, s. 2.

[156] *Ibid.*, s. 4.

[157] Concerning these and other enforcement measures, see *ibid.*, ss. 5-16.

[158] *Ibid.*, s. 17.

[159] *Ibid.*, s. 1(f). See *Securities Act*, *supra*, note 1, s. 1(1)40.

[160] *Business Practices Act*, *supra*, note 154, s. 1(f).

[161] *Ibid.*, s. 1(i).

It may be noted that the payment of annual maintenance fees or of that portion of the purchase price that is in consideration for the managerial services accompanying the project could be regarded as the purchase of a service "in respect of real property" or "provided for social [or] recreational...purposes". However, in relation to fee ownership, the proprietary interest itself is more properly seen as falling within the ambit of the *Real Estate and Business Brokers Act*.[162]

Although the BPA may not be the most appropriate statutory instrument for dealing with the sale of timeshare units, its list of unfair practices and enforcement mechanisms is particularly relevant to the most problematic timeshare marketing practices. "Unfair practices", as used in the Act, fall into two categories, namely, false, misleading, or deceptive consumer representations, and unconscionable consumer representations.[163] The former type of misrepresentation includes a misrepresentation with respect to the quality of the goods or services[164] and the existence of a certain price advantage,[165] and "a representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection he does not have".[166] In addition, representations using exaggeration, innuendo, or ambiguity as to a material fact, or the failure to state a material fact, which deceives or tends to deceive, are prohibited,[167] as are misrepresentations concerning the purpose or intent of any solicitation or communication with a customer.[168]

With regard to the second category of unfair practices, the Act provides that, in determining whether a consumer representation is unconscionable, "there may be taken into account that the person making the representation or his employer or principal knows or ought to know" that "the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors",[169] or that there is some "misleading statement of opinion" being made "on which the consumer is likely to rely to his detriment".[170] Similarly, the Act builds on the common law concern with duress by providing that, in determining unconscionability, consideration must be given to whether the person making the representation knows or ought to

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[162] *Supra*, note 98.

[163] *Business Practices Act*, *supra*, note 154, s. 2. "Consumer representation" is defined in s. 1(c).

[164] *Ibid.*, s. 2(a)(i) and (iii).

[165] *Ibid.*, s. 2(a)(x).

[166] *Ibid.*, s. 2(a)(ii).

[167] *Ibid.*, s. 2(a)(xiii).

[168] *Ibid.*, s. 2(a)(xiv).

[169] *Ibid.*, s. 2(a)(i).

[170] *Ibid.*, s. 2(b)(vii).

know that "he is subjecting the consumer to undue pressure to enter into the transaction".[171]

The BPA provides for consumer-initiated remedies, which in the timeshare context would consist of the purchaser's right to bring an action for rescission and damages where he has been induced to enter into the agreement by a consumer representation.[172] In addition, if the unfair practice is held to be an unconscionable consumer transaction, the court may award exemplary or punitive damages.[173] Where rescission is not a practicable remedy, the consumer is entitled to the difference between the amount paid and the "fair value of the goods or services received under the agreement or damages, or both".[174] The parties may not contract out of or waive the provisions of the BPA respecting remedies.[175] Finally, as an extra measure of legal protection, the statute specifies that, in a trial of an issue, "oral evidence respecting an unfair practice is admissible notwithstanding that there is a written agreement and notwithstanding that the evidence pertains to a representation of a term, condition or undertaking that is or is not provided for in the agreement".[176]

The public law remedies prescribed by the Act are administered and implemented by the Director,[177] who is empowered to order a person to cease engaging in an unfair practice.[178] Where a person receives a notice that the Director proposes to make such an order, that person is entitled to a hearing before the Commercial Registration Appeal Tribunal.[179] Another potentially useful device at the Director's disposal is one that has been employed in British Columbia under similar legislation enacted specifically to control the marketing techniques of timeshare developers,[180] and that has been used in Ontario in other commercial contexts—that is, the written

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[171] *Ibid.*, s. 2(b)(viii).

[172] *Ibid.*, s. 4(1)(a).

[173] *Ibid.*, s. 4(2).

[174] *Ibid.*, s. 4(1)(b).

[175] *Ibid.*, s. 4(8).

[176] *Ibid.*, s. 4(7).

[177] *Ibid.*, s. 5.

[178] *Ibid.*, s. 6(1).

[179] *Ibid.*, s. 6(3). Concerning the notice, see *ibid.*, s. 6(2).

[180] See Neilson, "Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation" (1981), 19 Osgoode Hall L.J. 153. *Re Scottish Inns of America* (B.C.) (Sept. 19, 1980) and *Re The Aloha Groups Inc.* (B.C.) (Jan. 6, 1981) involved assurances of voluntary compliance dealing with the aggressive promotion and sale of timesharing agreements. In the *Aloha Groups Inc.* undertaking, it was agreed by the respective parties that the suppliers' organizations would be governed by the British Columbia *Trade Practices Act*, R.S.B.C. 1979, c. 406, and that cancellation rights granted by the *Consumer Protection Act*, R.S.B.C. 1979, c. 65 would also apply to all future transactions of this kind.

assurance of voluntary compliance.[181] These agreements between the vendor and the Director are designed to avoid the imminent prosecution of the vendor and to put an end to the vendor's illegal marketing practices without the need to resort to an order to cease the unfair practice under section 6 of the Act.[182]

In addition to enforcement by private action or by the Director's authority, the BPA provides that persons or corporations engaging in certain conduct may be guilty of an offence.[183] If convicted, the offender could be subject to a maximum fine of $2,000 or imprisonment for a maximum of one year, or both.[184] Among the specific practices listed as constituting an offence are the furnishing of false information in an investigation under the Act;[185] the contravention of a regulation made pursuant to the Act;[186] failure to comply with an assurance of voluntary compliance;[187] and obstruction of an investigation ordered by the Minister of Consumer and Commercial Relations or by the Director under sections 10 and 11 of the BPA.[188] Subject to one exception, it is also deemed to be an offence under the Act to engage in any unfair practice knowing it to be an unfair practice.[189]

In Ontario, use has been made of powers granted under the Act to conduct investigations leading to the prosecution of offending vendors under the *Criminal Code*.[190] As under the *Real Estate and Business Brokers Act*,[191] an investigator appointed by the Minister or by the Director of the

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[181] *Business Practices Act*, *supra*, note 154, s. 9(1). Under s. 9(2), where the Director accepts an AVC, "the assurance has and shall be given for all purposes of this Act the force and effect of an order made by the Director". In Ontario, there have only been two AVC's entered into since 1981 (one in March, 1984, and one in February, 1984), neither of which was made with timeshare developers. Most of the actions taken by the Ontario Director pursuant to the *Business Practices Act* are in the form of orders to cease and desist (see *supra*, note 153). See Neilson, *supra*, note 180, at 185.

[182] It is interesting to note, however, that Neilson (*supra*, note 180, at 179-81) documents a move in British Columbia toward more criminal prosecutions instead of the use of AVC's. He observes that AVC's appear to be falling out of favour in that Province as the preferred enforcement mechanism of the British Columbia *Trade Practices Act*, *supra*, note 180. According to Neilson, this trend is due to what the British Columbia Ministry of Consumer and Corporate Affairs (now the Ministry of Labour and Consumer Services) terms "an accumulation of experience" (*supra*, note 180, at 181).

[183] *Business Practices Act*, *supra*, note 154, s. 17(1).

[184] *Ibid.* If a corporation is found guilty, the maximum fine is $25,000: *ibid.*, s. 17(3).

[185] *Ibid.*, s. 17(1)(a).

[186] *Ibid.*, s. 17(1)(b).

[187] *Ibid.*, s. 17(1)(c).

[188] *Ibid.*, s. 17(1)(d).

[189] *Ibid.*, s. 17(2).

[190] R.S.C. 1970, c. C-34. See Neilson, *supra*, note 180, at 184.

[191] *Supra*, note 98.

Business Practices Division has the powers of a commission under Part II of the *Public Inquiries Act*.[192] An investigation ordered by the Director may include a power to enter business premises, to examine the "books, papers, documents and things relevant to the subject-matter of the investigation", and to inquire into the relevant business affairs and practices of the person being investigated.[193] Moreover, in an investigation, the Minister or Director may appoint experts to examine the evidence thus obtained.[194]

The potential for the statute to be utilized as a broad remedial mechanism is therefore great, the Director being given a flexible discretion in pursuing various administrative approaches. The efficacy of the BPA's enforcement techniques when used in the context of timeshare marketing practices is, however, thus far untested in Ontario. The problem, of course, is that the applicability of the BPA specifically to timeshare agreements is unclear, due to the difficulty of legally characterizing the timeshare interests. Nevertheless, the Act does indicate a useful approach to the problem of how to control unfair business practices generally, and may well stand as a model for defining the range of offensive marketing techniques and appropriate remedial mechanisms in any comprehensive timeshare statute.

(iii) *Competition Act*

Perhaps the most wide-ranging piece of legislation affording protection to Canadian consumers and businesses is the federal *Competition Act*[195] (CA). The range of consumer and commercial transactions covered is evident in the fact that the Act applies to a "product", which is defined broadly to include both "an article and a service".[196] "Service" is defined to mean "a service of any description whether industrial, trade, professional or otherwise".[197] The definition of "article" reads:[198]

> 'article' means real and personal property of every description including
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> (a) money,
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> (b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a company or in any assets of a company,

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[192] *Business Practices Act*, *supra*, note 154, s. 10. See *Public Inquiries Act*, *supra*, note 131.

[193] *Business Practices Act*, *supra*, note 154, s. 11(2).

[194] *Ibid.*, s. 11(7).

[195] R.S.C. 1970, c. C-23, formerly known as the *Combines Investigation Act*.

[196] *Ibid.*, s. 2(1), as en. by S.C. 1974-75-76, c. 76, s. 1(4).

[197] *Ibid.*, s. 2(1), as en. by S.C. 1974-75-76, c. 76, s. 1(5).

[198] *Ibid.*, s. 2(1), as en. by S.C. 1974-75-76, c. 76, s. 1(1).

(c) deeds and instruments giving a right to recover or receive property,

(d) tickets or like evidence of right to be in attendance at a particular place, at a particular time or times or of a right to transportation, and

(e) energy, however generated.

The CA is concerned with the acts of selling, renting, leasing, or otherwise disposing of a product so defined, thus making it evident that no matter how a timeshare interest is legally structured, the business practices of timeshare developers are subject to its guidelines.

Part V of the Act, entitled "Offences in Relation to Competition", enumerates specific offences, several of which would appear to pertain directly to prevalent marketing practices of timeshare developers. By way of illustration, the Act prohibits the making of a representation to the public that is false or misleading in a material respect for the purpose of promoting the supply or use of a product or promoting any business interest.[199] Violation of this provision can result in a criminal conviction and a fine in the discretion of the court, or imprisonment for five years, or both.[200] Although typical "pyramid selling" schemes, which entail ongoing sales or lease transactions,[201] are unlikely to occur in the context of timeshare marketing, the prohibited practice of "referral selling" would seem highly relevant to the activities of timeshare sales personnel. Under this type of scheme, one person induces a second person to purchase or lease a product, promising the second person a rebate, commission, or other benefit based on the sale or lease of the same or other product to other persons whose names are supplied by the second person.[202] Finally, the CA also regulates the use of promotional lotteries and contests, which tend to constitute an important marketing tool in the sale or lease of timeshare interests. Such promotional gimmicks are prohibited unless there is adequate and fair disclosure of the number and approximate value of the prizes, distribution of the prizes is not unduly delayed, and prizes are awarded either at random or on the basis of some skill.[203] As with the misleading advertising provisions, violation of any of the marketing prohibitions may result in criminal liability, punishable by fine or imprisonment, or both.[204]

Part I of the CA is concerned with the methods of enforcement, and specifically deals with the gathering of evidence for a prosecution under the Act. The investigative mechanism can be set in motion either upon application by six adult persons resident in Canada who believe that an offence has

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[199] *Ibid.*, s. 36(1)(a), as en. by S.C. 1974-75-76, c. 76, s. 18(1).

[200] *Ibid.*, s. 36(5)(a), as en. by S.C. 1974-75-76, c. 76, s. 18(1).

[201] *Ibid.*, s. 36.3, as en. by S.C. 1974-75-76, c. 76, s. 18(1).

[202] *Ibid.*, s. 36.4, as en. by S.C. 1974-75-76, c. 76, s. 18(1).

[203] *Ibid.*, s. 37.2, as en. by S.C. 1974-75-76, c. 76, s. 18(1).

[204] *Ibid.*, ss. 36.3(3), 36.4(3), and 37.2(2), as en. by S.C. 1974-75-76, c. 76, s. 18(1).

been or is about to be committed,[205] or by the Director of Investigation and Research[206] if he has reason to believe that there is cause for an inquiry to be made.[207] If the Director decides to inquire into the conduct of any person, substantial investigatory powers are at his disposal. For example, he or his authorized representative may apply to the court for an order requiring that the person subject to the investigation be examined on oath on any matter relevant to the inquiry, or that such person produce a record or any other thing specified in the order.[208] In addition, the court may, if certain conditions are met,[209] issue a warrant authorizing the Director or any other person named therein to enter and search the premises specified in the warrant.[210] The Act also provides that any person who impedes or prevents an inquiry, or attempts to do so, is liable to a fine of up to $5,000 or imprisonment for two years, or both.[211]

It is clear, therefore, that although the *Competition Act* is by no means aimed at timesharing specifically, or even at real estate marketing generally, not only are its substantive provisions applicable to some of the more flagrant sales and promotional abuses in this area, but its investigatory and remedial features are rather far-reaching. As a consequence, developers and their sales personnel must have some regard for its prohibition of certain techniques by which purchasers are either deceived or unfairly induced to purchase a timeshare interest.

It is well known, however, that enforcement of these provisions has never quite reached its potential. It remains to be seen whether the recent amendments and restructuring of the statute will import a change in the strength of public enforcement. Notwithstanding the investigative and

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[205] *Ibid.*, s. 7(1), as en. by S.C. 1974-75-76, c. 76, s. 3(1), and am. by S.C. 1986, c. 26, s. 22.

[206] *Ibid.*, s. 5(1).

[207] *Ibid.*, s. 8(1), as en. by S.C. 1974-75-76, c. 76, s. 4, and am. by S.C. 1986, c. 26, s. 23.

[208] *Ibid.*, s. 9(1), as en. by S.C. 1986, c. 26, s. 24.

[209] *Ibid.*, s. 13(1), as en. by S.C. 1986, c. 26, s. 24. The conditions are as follows:

> (a) that there are reasonable grounds to believe that
>
> (i) a person has contravened or failed to comply with an order made pursuant to section 29, 29.1 or 30, or Part VII,
>
> (ii) grounds exist for the making of an order under Part VII, or
>
> (iii) an offence under Part V or VI has been or is about to be committed, and
>
> (b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be....

[210] *Ibid.*

[211] *Ibid.*, s. 41.

prosecutorial discretion left to the Director, the CA cannot be overlooked as an important device in the country's regulatory arsenal.

(iv) *Consumer Protection Act*

The *Consumer Protection Act*[212] (CPA) is, in general, designed to protect a "buyer", that is, "a person who purchases goods for consumption or services under an executory contract".[213] "Goods" are defined in the Act to mean "personal property",[214] which presumably would include a chose in action and, therefore, might extend to purely contractual timeshare interests. The term "services" is not defined in the statute, but arguably might include that part of a timeshare interest (whether fee or non-fee) that is attributable to the acquisition of management and other services in the development.

Turning to the requirement that the contract be "executory", the term "executory contract" is defined as follows:[215]

> 'executory contract' means a contract between a buyer and a seller for the purchase and sale of goods or services in respect of which delivery of the goods or performance of the services or payment in full of the consideration is not made at the time the contract is entered into....

Insofar as purely contractual timeshare interests are concerned, it might be argued that the purchase and sale of such an interest is an "executory contract" because delivery of the "goods" and performance of the "services"—that is, the right to use the timeshare unit and all recreational facilities in the development on a periodic basis for a specified number of years—are not made at the time the contract is entered into. A similar argument might be made with respect to the "services" component of fee and leasehold types of timeshare interest. On the other hand, it might well be argued, at least with respect to fee-type timeshare interests, that the interest itself is proprietary in nature, and thus accrues to the purchaser at the time of signing the contract.

The CPA is administered by the Registrar of the Consumer Protection Bureau,[216] with which all itinerant sellers must be registered in order to carry on business in Ontario.[217] The concept of an "itinerant seller", although apparently conceived as encompassing various forms of travelling salesmen who engage in soliciting, negotiating, or arranging for the signing of execu-

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[212] *Consumer Protection Act*, R.S.O. 1980, c. 87.

[213] *Ibid.*, s. 1(d).

[214] *Ibid.*, s. 1(j).

[215] Ibid., s. 1(i).

[216] *Ibid.*, s. 1(s).

[217] *Ibid.*, s. 4(1).

tory contracts at a place other than their permanent place of business,[218] may be highly relevant to the timeshare context, in that real estate agents typically work at the project site. Under the CPA, the Registrar is empowered to refuse to grant or renew the registration of such salespersons where they "cannot reasonably be expected to be financially responsible in the conduct of [their] business",[219] or where their past conduct affords reasonable grounds for belief that the sales business will not be carried on "in accordance with law and with integrity and honesty".[220] In addition, contravention of the CPA or any regulations passed thereunder will result in a refusal by the Registrar to grant or renew a registration.[221] The Registrar must serve notice of his proposal to refuse to grant or renew a registration, and must provide the applicant with written reasons.[222] In addition, the notice served upon the unsuccessful applicant or registrant must inform her that she is entitled to a hearing before the Commercial Registration Appeal Tribunal.[223]

The activities of itinerant sellers are monitored by an investigative mechanism, set in force by way of the receipt by the Registrar of a complaint by a consumer in respect of a seller.[224] Pursuant to such an investigation, the Registrar or his delegate may enter the business premises of the seller who is the subject of the complaint.[225] In addition, the Registrar or his delegate may enter business premises to make an inspection for certain purposes, such as to ensure compliance with the legislation relating to registration.[226] The person making an inspection is entitled to free access to any "books of account, cash, documents, bank accounts, vouchers, correspondence and records" found on the premises; any obstruction of the inspector or concealment of information constitutes a violation of the Act.[227]

When required by the Registrar, with the approval of the Director, an itinerant seller must file a financial statement showing any matters relating to the sales business that might be specified by the Registrar.[228] Where the Director believes that any person has not complied with any provision of Part I of the Act, dealing with itinerant sellers, or with the regulations or an

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[218] *Ibid.*, s. 1(k).

[219] *Ibid.*, s. 5(1)(a).

[220] *Ibid.*, s. 5(1)(b).

[221] *Ibid.*, s. 5(1)(d). Regulations are made by the Lieutenant Governor in Council under s. 40 of the *Consumer Protection Act*. See R.R.O. 1980, Reg. 181.

[222] *Consumer Protection Act*, *supra*, note 212, s. 7(1).

[223] *Ibid.*, s. 7(2).

[224] *Ibid.*, s. 9(1).

[225] *Ibid.*, s. 9(3).

[226] *Ibid.*, s. 10(1). See, also, s. 10(2).

[227] *Ibid.*, s. 11(1). See ss. 16(1) and 39 concerning offences.

[228] *Ibid.*, s. 13.

order made under Part I, the Director may apply to a judge of the High Court of Justice for an order directing that person to comply.[229] The failure to abide by such an order constitutes an offence under the Act.[230]

Section 19(1) of the Act specifies a number of provisions that virtually every executory contract[231] must contain in order for it to be binding on the buyer. This section provides that every executory contract for the sale of goods or services, as defined in the Act, must be in writing and, in accordance with section 19(1), must contain the following:

> (a) the name and address of the seller and the buyer;
>
> (b) a description of the goods or services sufficient to identify them with certainty;
>
> (c) the itemized price of the goods or services and a detailed statement of the terms of payment;
>
> (d) where credit is extended, a statement of any security for payment under the contract, including the particulars of any negotiable instrument, conditional sale agreement, chattel mortgage or any other security;
>
> (e) where credit is extended, the statement required to be furnished by section 24 [concerning the cost of borrowing];
>
> (f) any warranty or guarantee applying to the goods or services and, where there is no warranty or guarantee, a statement to this effect; and
>
> (g) any other matter required by the regulations.

Under section 19(2), "[a]n executory contract is not binding on the buyer unless the contract is made in accordance with [Part II] and the regulations and is signed by the parties, and a duplicate original copy thereof is in the possession of each of the parties thereto".

Section 21 of the Act gives to a buyer a right to rescind certain executory contracts. Section 21(1) provides as follows:

> 21.—(1) Where a seller solicits, negotiates or arranges for the signing by a buyer of an executory contract at a place other than the seller's permanent place of business, the buyer may rescind the contract by delivering a notice of rescission in writing to the seller within two days after the duplicate original copy of the contract first comes into the possession of the buyer, and the buyer is not liable for any damages in respect of such rescission.

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[229] *Ibid.*, s. 15(1).

[230] *Ibid.*, s. 16(1). See, also, s. 32, which provides for enforcement of the *Consumer Protection Act* generally.

[231] See *ibid.*, s. 18.

The CPA, in Part III, also makes provision for disclosure in respect of the cost of borrowing for the payment of goods or services and, in addition, sets out certain rules respecting advertisements of the cost of borrowing.[232]

Like the *Competition Act*,[233] the CPA deals with "referral selling" schemes, which unfortunately are relatively commonplace in the timeshare industry. Thus, one significant provision of the CPA with respect to timeshare marketing is that which prohibits the holding out to a buyer or prospective buyer of "any advantage, benefit or gain...for doing anything that purports to assist the seller in finding or selling to another prospective buyer".[234] The Act goes on to stipulate that any contract entered into following the holding out of such a "referral selling" advantage is not binding on the buyer.[235] This double coverage of referral selling schemes in the federal and provincial legislation is not, therefore, quite as redundant as it may seem, since the remedial approach of each is somewhat different.

In addition, the CPA provides that parties may not contract out of or waive any provision of the Act,[236] and that the Act is not to be seen as a derogation of any other existing rights of the buyer.[237] Finally, insofar as enforcement is concerned, the Act deals with false advertising and offences under the Act or the regulations. With respect to false advertising, section 38 provides that, "[w]here the Registrar believes on reasonable and probable grounds that a seller or lender is making false, misleading or deceptive statements in any advertisement, circular, pamphlet or similar material, the Registrar may order the immediate cessation of the use of such material",

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[232] For example, s. 24 imposes an obligation on a lender to provide the borrower with a disclosure statement before credit is given. The statement must give details of the agreement, including the actual sum received by the borrower; the downpayment or the sum credited in respect of a trade-in or for any other reason; the cost of borrowing, expressed in dollars and cents; the percentage that the cost of borrowing bears to the sum stated, expressed as an annual rate; any other fee or amount charged for insurance or for official fees; and the basis on which any additional charge is to be made upon default. Section 25 contains special rules governing disclosure where a lender is extending variable credit. The cost of borrowing is defined in s. 1 of the Act, and the method of calculating the percentage rate of interest by which this cost is expressed is prescribed by regulation: *ibid.*, s. 26 (see R.R.O. 1980, Reg. 181, s. 21).

With respect to advertisments of the cost of borrowing, s. 29(1) provides as follows:

> 29.—(1) Subject to the regulations, no lender shall represent, either orally or in print, or by radio or television broadcast, his charge for credit or cause such charge to be so represented unless the representation includes the full cost of borrowing and is expressed in the manner required by section 24 or 25.

Section 29(2) prescribes what a lender must include in his advertising where he advertises any terms of the credit agreement other than that referred to in s. 29(1).

[233] *Supra*, note 195.

[234] *Consumer Protection Act*, *supra*, note 212, s. 37(2).

[235] *Ibid.*, s. 37(3).

[236] *Ibid.*, s. 33.

[237] *Ibid.*, s. 35.

subject to a right on the part of the seller or lender to a hearing before the Commercial Registration Appeal Tribunal. The offences provision, section 39, is said to apply to "[e]very person who contravenes [the] Act or the regulations and every director or officer of a corporation who knowingly concurs in the contravention of [the] Act or the regulations".[238]

(v) *Conclusions*

In general, it would appear that in Ontario, under provincial and federal law, consumers are protected in their dealings with businesses in a somewhat piecemeal fashion. Thus, for example, the *Real Estate and Business Brokers Act*[239] governs the sale or lease of real property, while the *Business Practices Act*[240] is concerned with the sale of personal property under the heading "goods or services". The *Consumer Protection Act*[241] deals generally with the sale of "goods for consumption or services under an executory contract". The *Competition Act*[242] offers probably the broadest type of protection to consumers of timeshare interests but, as we have indicated, the level of enforcement of its provisions has not been entirely satisfactory.

Each of these statutes appears, then, to govern only a certain type of timeshare interest, or only certain kinds of abuse, while the aggregate effect of these pieces of legislation is that of both overlap and blatant gaps, with the result that a comprehensive regulatory package has not been achieved. What is interesting, however, is that the three provincial statutes utilize similar methods for ensuring the registration of those who deal with consumers, and that all four Acts enable the consumer to set in motion an investigative procedure whereby a public official is given broad powers to enforce compliance with the respective Acts.

The three provincial statutes also suffer from some uncertainty with respect to the extent to which timeshare interests are actually governed, which uncertainty results from the novelty and multiplicity of timeshare forms. Such a haphazard legislative approach is, of course, not a desirable situation in a field where the consumer is typically confronted with highly pressurized marketing techniques. Thus, on the marketing aspects of timeshare developments alone, there would appear to be a strong argument in favor of comprehensive legislation for all types of timeshare interest. Insofar as the marketing, investigative, and enforcement provisions are

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238 There is, however, a saving provision (s. 39(4)) with respect to an error or omission in any form where the deviation "is a *bona fide* accidental or clerical error or omission or beyond [the] control" of the person making it.

239 *Supra*, note 98.

240 *Supra*, note 154.

241 *Supra*, note 212.

242 *Supra*, note 195.

concerned, the similarity in the provisions of these consumer protection Acts may provide a basis for future legislative design.

(c) *Landlord and Tenant Act* and *Residential Tenancies Act*

While the current state of the relationship between the *Landlord and Tenant Act*[243] (LTA) and the *Residential Tenancies Act*[244] (RTA) is one of transition, it would appear that neither Act has applied, nor will either apply, to freehold, leasehold, or other right-to-use interests in timeshare units sold or likely to be sold in Ontario. Insofar as the RTA is concerned, although several sections have not yet been proclaimed in force,[245] section 4, which expressly provides that the Act does not apply to "living accommodation occupied as a vacation home for a seasonal or temporary period",[246] has been in force since the Act received Royal Assent in 1979. Therefore, the rental or sale of interests in timeshare developments is not within the purview of the RTA, nor will it be once the Act is proclaimed in its entirety.

The LTA also contains numerous sections and new amendments[247] that have not yet been proclaimed in force. In its current state, Part IV of the LTA governs residential tenancies, with section 1(c) stipulating that "residential premises" do not include such class or classes of accommodation as are designated by the regulations. In turn, the regulations have deemed "[p]remises rented as a vacation home for a seasonal or temporary purpose not exceeding four months" not to be residential premises for the purposes of the Act.[248] It would seem that virtually all timeshare interests fall under this exception, and that therefore the LTA does not apply even to those forms of timeshare arrangement where the relationship between purchaser and developer is clearly that of landlord and tenant.

Once the proposed amendments to the LTA have been proclaimed in force, Part IV of the LTA will be repealed[249] and control over residential tenancies will be transferred to the RTA.[250] The conclusion to be drawn is that neither the LTA (ultimately to be renamed the *Commercial Tenancies Act*[251]) nor the RTA serves to regulate freehold, leasehold, or other right-to-use timeshare interests in any way.

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243 *Supra*, note 111.

244 R.S.O. 1980, c. 452.

245 *Ibid.*, ss. 5-59, 62-69, 74, 111-13, 116, 119, 135(1), and the Schedule.

246 *Ibid.*, s. 4(b).

247 *Landlord and Tenant Act*, *supra*, note 111, Part V.

248 R.R.O. 1980, Reg. 457, s. 2.2.

249 *Landlord and Tenant Act*, *supra*, note 111, s. 131.4.

250 *Ibid.*, s. 131.3.

251 *Ibid.*, s. 131.1.

(d) *Land Transfer Tax Act*

The *Land Transfer Tax Act*[252] (LTTA) levies a provincial tax upon the conveyance of land in certain contexts. Ontario land that is conveyed for timeshare purposes to a purchaser of a freehold timeshare interest would seem to fall within the category of "recreational land" insofar as it is "predominantly used for the recreation and enjoyment of its owner or lessee or those...who are permitted by such owner or lessee to be on the land".[253]

Where recreational land is conveyed to or in trust for a transferee who is a "non-resident person",[254] the transferee must pay a tax computed at the rate of twenty percent of the value of the consideration for the conveyance.[255] Where, however, the transaction consists of a conveyance of recreational land to a person who is not a non-resident person, the LTTA imposes a substantially lesser tax based on the value of the consideration.[256]

The specific problem raised by the purchase of timeshare interests in freehold form is that of valuation. The tax imposed by the LTTA is designed as a property tax, and therefore fixes a purchaser's liability in accordance with the fair market value of the conveyed estate. Timesharing, of course, entails both the acquisition of a proprietary interest and the purchase of participatory rights in a recreation resort. Accordingly, the purchase price at the time of conveyance encompasses the combined cost of the property and the multifarious services of that resort. As the LTTA itself provides no mechanism by which to recognize a distinction between the property value and the value of the recreational services where both are conveyed in a single timeshare package, such recognition might appropriately be expressed in the context of timeshare legislation. While a comprehensive timesharing statute would not, of course, provide a forum in which to entrench an actual valuation formula for LTTA purposes, it could certainly provide a statutory

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252 *Supra*, note 111.

253 *Ibid.*, s. 1(1)(i).

254 *Ibid.*, s. 1(1)(g). A "non-resident person" includes a "non-resident corporation", which is defined in s. 1(1)(f), as am. by S.O. 1983, c. 20, s. 1(5).

255 *Ibid.*, s. 2(2). The phrase "value of the consideration" is defined in s. 1(1)(p) to include, among other things, the "gross sale price" plus the value of any liability assumed by the transferee and any benefit conferred by the latter on any person as part of the conveyance arrangement.

256 *Ibid.*, s. 2(1)(a), as en. by S.O. 1985, c. 21, s. 2(1). Under s. 2(1)(c) and (d), as en. by S.O. 1985, c. 21, s. 2(1), the tax is computed as follows:

> (c) at the rate of one-half of 1 per cent of the value of the consideration for the conveyance up to and including $55,000, and at the rate of 1 per cent upon the remainder of the value of the consideration; plus
>
> (d) where the value of the consideration for the conveyance exceeds $250,000 and the conveyance is a conveyance of land that contains at least one and not more than two single family residences, at the rates described in clause (c) plus an additional tax of one-half of 1 per cent of the amount by which the value of the consideration exceeds $250,000.

basis for the Minister of Revenue's recognition of the dual (that is, proprietary and service) nature of freehold timeshare interests.

(e) *ASSESSMENT ACT*

Municipal taxation of Ontario realty is based on an assessment of the value of the land, performed by the assessment commissioner for the region in question. The commissioner is appointed by the Minister of Revenue pursuant to the *Assessment Act*.[257] The Act also stipulates that land shall be assessed by each commissioner according to its market value,[258] although the question of assessment is more complicated than at first appears.[259] The tax rate is computed by dividing the figure representing the total expected municipal expenditures by the figure representing the commissioner's actual assessment of the property. The tax payable is the result of multiplying the assessment and the rate figures together.[260]

In Huntsville, Ontario, home of the Deerhurst Inn timesharing complex, the system of determining the municipal tax rate for timesharing complexes (which was originally based on the market, or resale, value of each interest) has for some time been a matter of controversy. Essentially, the developer's argument before both the Assessment Review Board and the Ontario Municipal Board has been that the original method of determining the market value of the complex as a whole unfairly results in the highest possible tax rate for this type of property.[261] In particular, the argument made by the developer emphasizes that the resulting "market value" of the timesharing complex takes into account attractions other than the realty itself—namely, the resort-type services provided by the developer—all of which combine to command the price paid by the timeshare purchaser. It

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[257] R.S.O. 1980, c. 31.

[258] *Ibid.*, s. 18(1). Section 18(2) provides that, except in respect of farm lands, "the market value of land assessed is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer".

[259] One leading commentator has said that "[i]n theory, market value appears to be the basis for assessment in Canada": Makuch, *Canadian Municipal and Planning Law* (1983), at 88. "In reality, however, market value assessments have not always been used": *ibid.*, at 93. In some cases, for example, certain classes of properties have been undervalued, where old assessments, some dating back to 1940, have been used. In this connection, reference should be made to s. 65(1) of the *Assessment Act*, which provides, in part, that assessment tribunals to which an appeal may be taken shall not alter any assessment unless the tribunal "is satisfied that the assessment is inequitable with respect to the assessment of similar real property in the vicinity". It has been said that the "purpose of the section is to prevent changes in the amounts of assessments because of a failure to assess at market value where there is no inequity between similar properties in the vicinity while the province moves to market value assessment": Makuch, *supra*, this note, at 94. See, also, ss. 61 and 62 of the *Assessment Act*.

[260] Canadian Bar Association—Ontario, Annual Institute on Continuing Legal Education, "Municipal Law—Municipal Assessment and Taxation" (1982), at 2.

[261] Interview with Mr. Ivan Cooper, Taxation Assessment Office, Bracebridge (March 8, 1988).

has been Deerhurst's contention that timeshare complexes should be assessed on a "cost basis", like that of other hotels and holiday resorts, which results in a much lower tax rate.[262]

The Ontario Municipal Board has ruled that the timeshare units at Deerhurst should be assessed as a hotel insofar as the unsold units assessed to the developer are concerned, but that the municipality is free to apply a "market value" standard to the timeshare interests already in the purchasers' hands.[263] As a matter of practice, however, the assessment office has determined that Deerhurst represents a tightly integrated ownership and resort complex, and so has now assessed the entire development as it would any hotel.[264]

As can be seen, the problematic feature of all timeshare arrangements, whether of a freehold or non-freehold nature, is that the developments by their very nature combine in a single commercial package the value of the property with that of the resort facilities. Accordingly, timesharing inevitably presents property tax assessors with a built-in policy dilemma.

(f) *Co-operative Corporations Act*

Like the *Condominium Act*,[265] the *Co-operative Corporations Act*[266] (CCA) would apply to any timeshare development whose form of ownership falls within its jurisdiction. While the CCA makes no specific mention of timesharing, it is made applicable to all provincially incorporated co-operatives.[267] Accordingly, the Act would apply to any timesharing arrangement in which the property is owned by a corporation operated on a co-

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262 Interview with Pat Midgley, Realty Sales Consultant, Deerhurst Inn (August 17, 1986).

263 *Regional Assessment Commissioner, Region 17 v. Deerhurst Resorts Ltd.* (1985), 17 O.M.B.R. 379.

264 Interview with Ms. Elaine Cash, Evaluation Analyst, Special Properties Branch of the Ontario Ministry of Revenue (March 11, 1988). Ms. Cash indicated that this assessment could well vary from project to project, as it is based on a factual evaluation of the particular development in question.

265 *Supra*, note 62.

266 *Supra*, note 108.

267 Section 3 provides as follows:

> 3. This Act, except where it is otherwise expressly provided, applies,
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> (a) to every corporation incorporated as a co-operative by or under a general or special Act of the Parliament of the former Province of Upper Canada;
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> (b) to every corporation incorporated as a co-operative by or under a general or special Act of the Parliament of the former Province of Canada that has its head office and carries on business in Ontario and that was incorporated with objects to which the authority of the Legislature extends; and

operative basis,[268] incorporated under the CCA, and in which each time-share user-owner is a member of the corporation.

As with condominiums,[269] the regulatory scheme applicable to co-operatives incorporated under the CCA is comprehensive. For present purposes, however, it is sufficient to note only those requirements of the Act that have particular significance in the timeshare context. For example, section 34(1) of the CCA, which requires the filing of an "offering statement" in connection with the issue or resale of securities[270] of the co-operative[271] provides as follows:

> 34.—(1) No co-operative or person shall sell, dispose of, or accept directly or indirectly any consideration for securities of the co-operative where the co-operative has more than fifteen security holders, or where the sale or disposition of or acceptance of consideration for such securities would have the effect of increasing the number of security holders in the co-operative to more than fifteen, unless the co-operative has filed with the Minister an offering statement and has obtained a receipt therefor.

This provision, of course, provides the corollary to the exemption from the filing of a prospectus afforded to co-operative corporations under the *Securities Act*.[272] As with a prospectus, an offering statement under the CCA must conform to certain strict statutory requirements. Section 35 of the Act provides as follows:

> 35.—(1) An offering statement shall provide full, true and plain disclosure of all material facts relating to the securities proposed to be issued.
>
> (2) An offering statement shall comply as to form and content with the requirements of this Act and the regulations.
>
> (3) There shall be filed with an offering statement such documents, reports and other material as are required by this Act and the regulations.

> (c) to every corporation incorporated as a co-operative by or under a general or special Act of the Legislature,
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> but this Act does not apply to a corporation to which the *Credit Unions and Caisses Populaires Act* applies.

In addition, s. 4(1) of the CCA provides that "[a] co-operative may be incorporated under this Act for any lawful objects to which the authority of the Legislature extends, except those of a corporation the incorporation of which is provided for in any other Act".

[268] The definition of "co-operative basis", contained in s. 1(1)6 of the CCA, is substantially reproduced *supra*, ch. 2, note 66.

[269] See *supra*, this ch., sec. 2.

[270] Section 1(1)22 of the *Co-operative Corporations Act*, *supra*, note 108, defines "security" to mean "any share of any class of shares or any debt obligation of a corporation".

[271] Section 34(2) provides three exceptions to the requirement.

[272] *Supra*, note 1, s. 72(1)(a).

> (4) Where there is a material change in the facts set forth in an offering statement, whether before or after the issuance of a receipt therefor, the co-operative shall, within thirty days of that change, file with the Minister a statement of such change.

Pursuant to section 36(1), the Minister, in his discretion, is permitted to issue a receipt for any offering statement filed under section 34, or any statement of change filed under section 35(4) or (5), unless it appears that the statement, or any required supporting document,

> (i) fails to comply in any substantial respect with any of the requirements of [the] Act or the regulations,
>
> (ii) contains any statement, promise, estimate or forecast that is misleading, false or deceptive, or
>
> (iii) conceals or omits to state any material facts necessary in order to make any statement contained therein not misleading in the light of the circumstances in which it was made....

Finally, pursuant to section 37(1) of the CCA, where the Minister has issued a receipt in respect of an offering statement, a copy of the statement must be open for inspection at both the offices of the Ministry and the head office of the co-operative.

In addition to the above disclosure requirements, we should also note some of the member protection provisions contained in the Act. While the authority to "manage or supervise the management of the affairs and business of the co-operative" is vested in the board of directors,[273] a number of actions must be confirmed by the members. For example, although the directors are authorized to pass by-laws to regulate a wide variety of matters concerning the affairs of the co-operative,[274] no by-law is effective until it has been passed by the directors and "confirmed, with or without variation, by at least two-thirds of the votes cast at a general meeting of the members of the co-operative".[275]

Another significant member protection provision concerns the sale of the co-operative's assets. A resolution "to sell, lease, exchange or otherwise dispose of all or substantially all of the property of the co-operative"[276] is not effective until it has been passed by the directors and confirmed by at least

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[273] *Co-operative Corporations Act*, *supra*, note 108, s. 96(1). See, also, s. 87 which provides, in part, that "[n]o person shall be a director of a co-operative unless he is a member thereof".

[274] *Ibid.*, s. 21. Note particularly s. 21(j), which permits the directors to pass by-laws to regulate "the conduct in all other particulars of the affairs of the co-operative".

[275] *Ibid.*, s. 23.

[276] *Ibid.*, s. 15(2)17.

two-thirds of the votes cast at a general meeting of the members.[277] Moreover, the articles of incorporation of the co-operative may specify that a greater proportion of the votes cast by the members is required to confirm such a resolution.[278] Similarly, amendments to the co-operative's articles of incorporation[279] require confirmation by at least two-thirds of the votes cast at a general meeting of members.[280] In addition to this requirement, where the amendment is to convert a co-operative with share capital to one that is without share capital, or *vice versa*, or to convert the co-operative into a corporation governed by either the *Business Corporations Act, 1982*,[281] or Part III of the *Corporations Act*,[282] the amendment must be confirmed in writing by sixty percent of the members.[283] Finally, where it is proposed to amend the articles so as to delete or vary any of the rights attached to any class of preference shares of the co-operative, approval of the resolution also requires confirmation by at least two-thirds of the votes cast at a general meeting and, in addition, may require the written consent of 100 percent of the holders of the affected class of shares.[284]

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277 *Ibid.*, s. 1(1)24.

278 *Ibid.*

279 *Ibid.*, s. 151(1).

280 *Ibid.*, s. 151(2), as en. by S.O. 1981, c. 61, s. 1.

281 S.O. 1982, c. 4.

282 R.S.O. 1980, c. 95.

283 *Co-operative Corporations Act*, *supra*, note 108, s. 151(3), as en. by S.O. 1981, c. 61, s. 1.

284 *Ibid.*, s. 151(4).

CHAPTER 4

RECOMMENDATIONS FOR REFORM

1. THE CASE FOR COMPREHENSIVE STATUTORY REFORM

(a) Introduction

As has been seen in the first half of this Report, the solution to the problems confronting the timeshare industry in Ontario would seem to lie neither in the *Securities Act* nor in the *Condominium Act*.[1] The very uniqueness of the concept of timesharing, and the multiplicity of legal forms encompassed within this concept, take these interests beyond the scope of traditional definitions of securities and condominiums. Enacting the necessary amendments to either of these two existing statutory frameworks would not only be an onerous legislative task, but might well undermine some of the purposes of the present regulation of the securities industry and condominium developments.

Accordingly, this section of the Report will focus on the possibility of enacting comprehensive timeshare legislation. The goal, of course, is to establish the groundwork for a legislative scheme that is tailor-made to the timeshare concept and its numerous legal embodiments, and to provide a vehicle through which all of the various and special problems involved in timeshare development, marketing, ownership, and management can be addressed. As such comprehensive legislation would appear to be the only means of addressing all of the issues outlined in the earlier chapters of this Report, it would seem to represent the sole mechanism by which the Province can advance the development of the timesharing industry in Ontario beyond its present nascent state.

In addition to the evident merits of a comprehensive legislative package, such an approach would appear to have a lack of notable disadvantages. The only apparent danger in enacting a new and uniquely tailored statute would seem to be the possibility that the Legislature might somehow fail to

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[1] *Securities Act*, R.S.O. 1980, c. 466, and *Condominium Act*, R.S.O. 1980, c. 84. See discussion *supra*, ch. 3, secs. 1 and 2.

locate and articulate the appropriate level of regulatory control. Needless to say, both over-regulation and under-regulation are potentially problematic, since the former approach might unduly restrain the industry's development and the latter approach would merely continue the present state of haphazard (and, in many areas, non-existent) regulation. However, if the proper balance is struck, there do not appear to be any disadvantages of such legislation. The more unscrupulous timeshare promoters will be the only ones to suffer adverse consequences from the introduction of a comprehensive statutory framework; reputable developers, consumers, and the economy at large should reap the benefits.

Accordingly, the Commission recommends that regulation of timesharing in Ontario should not be by way of amendment to the *Condominium Act*, the *Securities Act*, or any other legislation that currently touches on the development, sale, and ownership of timeshared property; rather, the Legislature should enact a new statute, to be known as the *Timeshare Act*, that will deal comprehensively and systematically with all aspects of timesharing.

(b) Enabling Provisions

The preliminary issue that must be addressed in designing a timeshare statute is that of the general nature of the proposed legislation. In particular, the question arises as to whether enabling legislation is required and, if so, whether enabling provisions that address the central problem of accommodating property law to a novel concept are sufficient, or whether regulatory provisions are also advisable. While it is clearly the Commission's position that both types of legislative intervention are called for in the timesharing context, a brief canvassing of these two primary questions will help flesh out the overall thrust of any statutory effort.

Although the survey of the existing legal environment in which timesharing has been operating indicates that it may well be possible to have time and space property interests at common law,[2] enabling legislation is nonetheless desirable in a number of respects. Of prime concern is the fact that the position of traditional property doctrine with respect to ownership of blocks of time is not entirely clear. Indeed, the uniqueness of the concept has led to some hesitation in its finding general acceptance as a legitimate form of real property interest. As a consequence, one cannot help but conclude that, although the existing common law structure has not quite prohibited timeshare holdings from taking root in the Province, it has to a large extent contributed to the industry's stifled rate of growth. Statutory enabling provisions would therefore bring an element of certainty into the law governing timesharing which, if not absolutely necessary from a technical point of view, is certainly desirable in terms of the overall legislative policy of encouraging the growth of timesharing in a controlled environment.

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[2] See the discussion of fee simple ownership, *supra*, ch. 2, sec. 1(a)(iii).

Moreover, particular difficulties, such as partition actions,[3] certainly would be ameliorated as a result of the type of legislative clarification that specific enabling provisions inevitably embody. Most important, however, is the fact that express statutory recognition of timesharing would doubtless eliminate much of the necessity for the legal creativity in structuring the holdings that until now has characterized the timeshare phenomenon, thereby providing a much needed basis for simplicity.

Accordingly, we recommend that the proposed *Timeshare Act* should contain enabling provisions that recognize the validity and facilitate the conveyancing of timeshare interests. In accordance with recommendations to be made in a later section of this chapter,[4] all timeshare interests covered by the Act would be declared to be interests in land and specifically registrable as property interests under the *Registry Act*[5] and the *Land Titles Act*,[6] regardless of their nature or duration.

(c) Regulatory Provisions

In view of the manifold problem areas identified in the survey of the existing law governing timesharing, it is not difficult to conclude that, however great the improvement in the legal environment effected by the introduction of enabling legislation, such provisions are not in themselves sufficient. The various marketing, management, and other abuses that have been identified in foreign jurisdictions where timesharing is more prevalent can be addressed and prevented only where enabling legislation is coupled with regulatory control. Although the combined objectives of fostering growth while protecting consumers are to a great extent furthered by timeshare enabling legislation, a rationally structured and truly protective legal environment cannot be assured in the absence of adequate regulation.

The next question to be addressed, therefore, is that of the nature of the regulatory legislation to be implemented. Essentially, the choice is between legislation whose policy thrust is purely that of disclosure, and a scheme in which there is room for some administrative scrutiny of the merits of any proposed timesharing development. In a disclosure type of statute, any administrative body that might be established under the scheme would be charged with a mandate limited to ensuring that the disclosure requirements of the statute have been met. By contrast, if the regulation is to be of the merits of the development, such an agency would have responsibility for a more substantive review.

Generally, disclosure legislation is based on the theory that consumer protection is adequately accomplished where the market operates in such a

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[3] See *supra*, ch. 2, sec. 6.

[4] *Infra*, this ch., sec. 7(c)(ii)(a).

[5] *Registry Act*, R.S.O. 1980, c. 445.

[6] *Land Titles Act*, R.S.O. 1980, c. 230.

way as to provide all of its participants with all relevant information. The presumption is that the consumer, if fully knowledgeable about a particular transaction, is capable of making, and can fairly make, any decision as to whether she desires to become involved. Most consumer protection legislation operates on the principle of full disclosure,[7] as does the *Condominium Act*[8] and, for the most part, the *Securities Act*.[9] The disclosure philosophy would also seem to reflect the governing principle underlying the comprehensive timeshare statutes in the United States.

The reason for any legislative preference for disclosure regulation over merits review is that it is thought to allow greater scope for private decision making. On the other hand, of course, there are certain situations where the complexity or quantity of relevant information is such as to prohibit the dissemination of all of the data necessary to ensure a properly functioning market. In these situations, of which the issuance of certain types of securities is a prime example, legislation is typically introduced that "involves the imposition of standards of conduct...going beyond disclosure, and frequently providing for discretionary...interposition of the business or ethical judgment of a government official between seller and purchaser, requiring some official stamp of approval...".[10]

The merits (or, in securities legislation parlance, the "blue sky") approach to regulation may perhaps best be illustrated by reference to the Ontario *Securities Act*, which, while primarily a disclosure statute, does contain certain provisions calling for limited substantive review. Thus, for example, the Director of the Ontario Securities Commission retains a discretion under the Act to refuse to issue a receipt for a prospectus where "it appears to him that it is not in the public interest to do so".[11] Even in these circumstances, however, the power of a merits review is circumscribed by the general thrust of the disclosure policy; and, indeed, the Director has been advised by the Ontario Securities Commission not to exercise his discretion in this regard unless the situation is such as to require certain safeguards for the benefit of the investing public that could not be introduced by merely increasing access to information.[12]

Although the problems associated with unregulated timesharing are serious, there is no evidence of the type of abuse that is inherently irremediable through increased disclosure by developers. In fact, once the primary enabling provisions are in place, the remaining issues of concern to the

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[7] See, for example, the discussion of the *Consumer Protection Act*, R.S.O. 1980, c. 87, *supra*, ch. 3, sec. 3(b)(iv).

[8] *Supra*, note 1.

[9] *Supra*, note 1.

[10] Williamson, *Securities Regulation in Canada* (1960), at 3.

[11] *Securities Act*, *supra*, note 1, s. 60(1).

[12] *Rivaldo Investment Corp.*, [1965] O.S.C.B. 2 (Dec.), at 4.

consumer are for the most part in the nature of access to accurate information regarding the general character and specific terms of the investment. While certain minimum standards of marketing and managerial practices must be built into the regulatory scheme in order to provide a baseline of protection to even those purchasers who pay little attention to the information disclosed by the developer prior to the sale, the policy of full disclosure would seem to address adequately the majority of consumer concerns. As in the context of traditional condominium sales, timeshare purchasers may be seen to be generally capable of synthesizing information and operating in an otherwise unrestrained market so long as the relevant data is made available.

Although all American timeshare statutes embody a dual enabling and regulatory thrust, they typically do not sanction the exercise of discretionary powers on the part of an administrative body to review the merits of any timeshare offering. Similarly, while British Columbia's *Real Estate Act*[13] requires that a prospectus or disclosure statement be filed by a timeshare developer, it goes on to require that any such prospectus be accompanied by an express and conspicuous statement that the provincial regulatory agency has not "in any way passed on the merits of the matters dealt with in [the] prospectus".[14] In view of this general consensus among North American jurisdictions to eschew the "blue sky" or merits approach to the regulation of timesharing, and having regard to the paucity of timeshare developments and regulatory experience within Ontario, it does not appear that there is at present any reason to build an extensive discretionary merits review into the new Ontario legislation. Rather, the case for a comprehensive statutory framework is for the most part limited to the traditional type of disclosure legislation. Accordingly, while it is recommended that the proposed timeshare statute should contain extensive regulatory provisions governing the sale, ownership, management and termination of timeshared property, the regulatory provisions should be, for the most part, of a disclosure nature, and should not permit a review of the merits of a timeshare development by a government agency.

2. JURISDICTION

Several questions arise with respect to the jurisdictional scope of the new legislation. Whereas the basic policy proposed herein is that of constructing as comprehensive a legislative scheme as possible, there is a threshold decision to be made as to whether any given timeshare enterprise should be within or outside the statute's purview. Specifically, the questions pertaining to out-of-province timeshare sales must be addressed, as must the various issues relating to the form, size, and duration of the timeshare projects to be included within the Province's regulatory ambit.

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[13] R.S.B.C. 1979, c. 356, s. 50, as am. by S.B.C. 1981, c. 28, s. 9.

[14] *Ibid.*, s. 51(3).

(a) Ontario and Foreign Projects

As previously discussed, certain out-of-province timeshare developments that are sold to consumers in Ontario are subject to the disclosure and other regulatory requirements of the *Real Estate and Business Brokers Act*.[15] One possibility, of course, would be to restrict any new legislation to developments in Ontario, leaving the current regulation of foreign timeshare developments in its present state under the *Real Estate and Business Brokers Act*. Alternatively, it might be considered preferable to regulate all timeshare projects that are marketed in Ontario, whether domestic or foreign, in one newly created comprehensive statute. While the latter option is desirable from the point of view of regulatory efficiency and legislative clarity, the former has the virtue of embodying a more minimal legislative change.

Nevertheless, given the evident shortcomings of the present regulation of foreign timeshare sales under the *Real Estate and Business Brokers Act*, we have concluded that there really is no choice at all. It will be recalled that regulation under that statute is limited to fee and leasehold timeshare interests and to right-to-use projects that involve "a specific unit, in a specific building for a specific period of time each year".[16] The substance of this regulation is that of pure disclosure, entailing prospectus requirements to which all developers must conform under the Act when "trading in subdivision lots outside of Ontario".[17] As will be seen, while this statutory regulation of foreign timeshare developments marketed in Ontario is satisfactory to a certain extent, it falls short of the type of comprehensive regulation at which the new statutory scheme should, in our view, aim.

First, the provisions of the *Real Estate and Business Brokers Act* do not regulate all types of timeshare interest. For example, foreign right-to-use timeshare offerings that provide for either floating units or floating time periods do not fall within its regulatory ambit. Perhaps more importantly, this legislation was evidently not drafted with timesharing in mind, and, accordingly, an assortment of problems that are peculiar to the timeshare industry have not been addressed in the degree of specificity that they would seem to warrant. Most notably, developer insolvency following the short rescissionary period remains unaddressed, as do all of the problems associated with the operations of timeshare exchange companies affiliated with foreign projects. Similarly, the Act contains no mention of minimum managerial standards designed to protect purchasers on an ongoing basis. In view of these shortcomings, and in order to ensure consistency and uniformity in provincial regulation of the timeshare industry, it would seem best to

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[15] *Real Estate and Business Brokers Act*, R.S.O. 1980, c. 431. See discussion *supra*, ch. 3, sec. 3(b)(i).

[16] Directive from Mr. J.R. Cook, Assistant Registrar, *Real Estate and Business Brokers Act*, Business Practices Division, Ministry of Consumer and Commercial Relations (July, 1982).

[17] *Real Estate and Business Brokers Act*, *supra*, note 15, ss. 37-46.

enact a comprehensive statute that applies to both domestic and foreign projects. Not only does there appear to be no fundamental reason why the same general requirements should not be applicable to all timeshare projects that are marketed in Ontario, regardless of their *situs*, but, indeed, given the small number of domestic timeshare developments and the large number of foreign timeshare projects sold to consumers in Ontario, it would seem that regulation of out-of-province developments is at present the most important aspect of any new statutory initiative.

It may be noted that a majority of the timeshare statutes that have been enacted in the United States regulate both domestic and out-of-state projects.[18] Likewise, this approach has been supported by the Legal and Legislative Committee of the Resort Timesharing Council of Canada, which has stated its position as follows:[19]

> It is submitted that all Timeshare projects marketed in Ontario, constructed out of the Province, should meet all the requirements of the Ontario Act which would apply to Ontario projects. In addition to those basic requirements, it may well be that the Province will have other consumer protection mechanisms which should be applied in the same manner as applied to present registration requirements.

Finally, British Columbia's *Real Estate Act* defines a "time share plan" as including "any time share ownership plan or time share use plan, whether in respect of land situated inside or outside the Province...".[20]

It would seem, therefore, that the expansive approach to geographical jurisdiction for any comprehensive timeshare legislation has achieved widespread support. We, too, support this approach and accordingly recommend that the proposed *Timeshare Act* should apply to both domestic projects and foreign projects that are marketed within Ontario.

There is, however, one *caveat* to this conclusion. That is, there may be room for certain limited exemptions for foreign timeshare projects from the extended jurisdictional reach of the Ontario legislation. The Florida Real Estate Time-Sharing Act, for example, provides that out-of-state projects are not required to satisfy the regulatory provisions dealing with such

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[18] For example, regulation of foreign projects is explicit in the timeshare statutes of Nebraska, Tennessee, Virginia, South Carolina, Georgia, Florida, Hawaii, and Louisiana. But see National Conference of Commissioners on Uniform State Laws, Model Real Estate Time-Share Act, Vol. 7B (hereinafter referred to as "Model Act"), §1-111(c), which provides that the "Act does not apply to time shares in units located outside this state", except for the provisions respecting the public offering statement (§§4-103 to 4-106).

[19] Ontario Legal and Legislative Committee, Resort Timesharing Council of Canada, *Submission to the Ontario Law Reform Commission* (May, 1983) (hereinafter referred to as "RTCC Submission"), at 6.

[20] *Supra*, note 13, s. 1, as en. by S.B.C. 1981, c. 28, s. 1.

matters as management and zoning.[21] We, too, shall recommend, at a later stage of this Report, that our proposed management provisions not apply to foreign timeshare projects.[22] Moreover, although it is not proposed that zoning be included as part of the present statutory initiative, there may well be other, purely local, aspects of timeshare regulation that are inappropriately applied to out-of-province developments. In our view, the Registrar of the agency that, in accordance with subsequent recommendations, will regulate timesharing should have the power to exempt foreign developments from compliance with such purely local requirements, and we so recommend. Subject to these exceptions, however, the overall jurisdictional thrust of the legislation should be expansive.

(b) Forms of Timeshare Interest Covered

It will be recalled that the first part of this Report outlined the numerous forms that timesharing can take. Indeed, the very multiplicity of forms of timesharing was itself identified as one of the problematic aspects of the industry insofar as the structure of its legal environment is concerned. As noted, timeshare interests are generally divisible into two general categories—fee ownership, and non-fee ownership or right-to-use interests. These two broad categories are then further subdivided into three basic forms of fee ownership interest—tenancy-in-common, interval ownership, and fee simple ownership—and four types of right-to-use interest—leases, licences, club memberships, and co-operatives. The preliminary question arises, therefore, as to whether the proposed legislation should encompass within its regulatory ambit all of these possible forms.

It would seem crucial that any timeshare legislation, in order to be comprehensive in scope, must define its regulatory jurisdiction so as to include all possible forms of timeshare interest. This conclusion is implicit in the initial identification of the variety of timeshare forms as one of the problematic aspects of the existing haphazard state of the law. The general practice in those American jurisdictions that have enacted such legislation is to provide for the regulation of both broad categories of timeshare interest—that is, fee and non-fee structures—in the definitional sections of the timeshare statute. In any Ontario initiative, it would seem similarly wise to include two broadly worded provisions defining timeshare ownership interests and non-ownership interests in an effort to encompass all forms of timeshare arrangement. Given the proven creativity of solicitors for timeshare developers in structuring new permutations of these property holdings and contractual interests, the definitional sections should properly be worded in as all-embracing a fashion as possible. We so recommend.

A further issue arises with respect to the inclusion of timeshared personal property interests in the proposed legislative scheme. After all, the

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[21] Florida Real Estate Time-Sharing Act, Fla. Stat. Ann., §721.03(2) (West).

[22] See *infra*, this ch., sec. 8(a).

timeshare concept has been applied to such items as yachts, airplanes, and other recreational vehicles, in addition to the more typical cottages, houses, and apartment units. Notwithstanding the increased prevalence of timeshare arrangements with respect to personalty, however, most American timeshare legislation is restricted in its application to real property interests.[23] In addition, the majority of such Acts do not apply to recreational vehicle campgrounds or parks that provide the land and facilities for use of recreational vehicles rather than an interest in the real property itself.[24]

Although the latter type of interest may well arise in the future, it would appear that, at present, there are no recreational vehicle campgrounds in Ontario that are being operated on a timeshare basis. There are, however, several companies offering timeshare arrangements with respect to sailboats and yachts whereby, typically, a purchaser is entitled to use the vessel for a several week vacation in the Caribbean or off the coast of Florida, while a Canadian trust company holds title for the owners and administers an operating fund to which purchasers contribute. Thus, while it is recommended that the proposed Ontario timeshare statute should apply to all structures situated on real property and designed for residential occupancy on a timeshared basis, a decision must also be made as to whether timeshare structures with respect to recreational vehicle campgrounds or items of personalty should also be included.

Notwithstanding their current absence from the Ontario vacation scene, we have concluded that the potential dangers associated with recreational vehicle campgrounds make them a likely candidate for regulation. Typically, recreational vehicle campgrounds are structured as leasehold interests in which the vendor retains title to the property and provides the purchaser with the right to use a portion of the property for the purpose of locating a recreational vehicle for a certain number of weeks each year and for a specified number of years. Accordingly, such purchasers are, like all timeshare purchasers, subject to possible divestment of their interest should the owner of the property become insolvent. There is, therefore, strong reason to include these arrangements within the consumer protection requirements of the proposed statute, at least insofar as full disclosure and developer insolvency is concerned. It may well be, however, that various

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[23] See, for example, Or. Rev. Stat. §94.807(10), which provides expressly that the Act does not apply to the "offering, sale or transfer of a membership or interest entitling the purchaser to a timeshare in personal property, including but not limited to an airplane, boat, or recreational vehicle". See, also, Georgia Time-Share Act, Ga. Code Ann. §44-3-162(22) and (26), and Virginia Real Estate Time-Share Act, Va. Code §55-362.

[24] See, for example, Washington Timeshare Act, Wash. Rev. Code Ann. §64.36.290(2): "[The chapter of the Code dealing with timeshares] shall not apply to any enterprise that has as its primary purpose camping and outdoor recreation and camping sites designed and promoted for the purpose of purchasers locating a trailer, tent, tent trailer, pick-up camper, or other similar device used for land-based portable housing".

But see the inclusion of such campsites in the Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.05(1) (West), and S.D. Codified Laws Ann. §20:56:20:01.

aspects of the comprehensive statutory scheme will be inappropriate to such vehicle campgrounds, which, after all, provide little more than an empty spot in a park and some limited services and facilities. It would not seem to pose too great a problem to include recreational vehicle campgrounds within the definitional sections of the timeshare legislation, and then to exempt such campgrounds from the management or other particularly inappropriate sections of the Act. It is therefore recommended that the proposed *Timeshare Act* should apply to recreational vehicle campgrounds, except for the proposed management provisions of the Act and other clearly inappropriate provisions.

As far as personal property is concerned, the tendency has been to overcome many of the problems associated with co-ownership through the use of a trust. Under this approach, purchasers are protected from the problem of a co-owner encountering financial difficulties by ensuring that title to the personal property is held in trust. This, then, is accompanied by an arrangement whereby all funds relating to the operation of the boat or airplane are handled by the trust company that holds title. Although there are no statutory requirements that this arrangement be pursued, the purchase of a timeshare interest in such luxury items as a yacht or airplane seems to be so exotic a holiday arrangement that it has to date attracted only particularly sophisticated consumers. As such, there have been few, if any, reports of unprotected purchasers, and the need for regulatory intervention to supplement the protections already afforded by way of contract and property law has been absent.

Given the particular real property slant to the majority of provisions in any timesharing statute, the inclusion of personalty within the definitional ambit of the legislation would necessarily require a large number of exceptions and exemptions throughout the statute. This complexity, combined with the lack of any current or pressing need for consumer protection in this field, constitutes, in our view, a strong argument for excluding personalty from the present regulatory initiative, and we so recommend.

(c) Number of Interests and Length of Term

The final consideration relating to the jurisdictional ambit of the proposed statute is that of its application to projects in which there is a minimal number of timeshare interests sold or that are designed to last for a limited duration. Certain timeshare legislation in the United States is expressly restricted in its application to developments that consist of a specified number of timeshares. Thus, for example, the Oregon statute applies only in the context of a development comprising thirteen or more timeshares, and the Arizona timeshare legislation applies only to developments that contain twelve or more.[25] Presumably, this type of jurisdictional

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[25] Or. Rev. Stat. §94.807(7), and Ariz. Rev. Stat. Ann. §32-2197.1. See, also, Nev. Rev. Stat. §119A.170.1 (more than 12 time shares); Arkansas Time-Share Act, Ark. Stat. Ann. §50-

restriction is designed to accommodate cases where timeshare purchasers are relatives or personal acquaintances who wish to share a small property. Regulation in such an instance would seem unwarranted, as there is little chance of injury to any individual timeshare owner or to the public at large.

It is also not uncommon for timeshare legislation in the United States to exempt arrangements that are structured to last for only a minimal term. The Washington Timeshare Act defines "timeshare" to mean the right to occupy a unit during three or more separate time periods over a period of at least three years, while the Virginia and Arizona statutes apply in the case of terms of five or more years.[26] Although some American statutes do not specify any minimum term in defining the jurisdictional reach of a timeshare regulatory enactment,[27] a number of jurisdictions have acknowledged that the vast majority of problems associated with timesharing have arisen as a result of its long term nature and have therefore excluded short term arrangements from regulation.

The task is to strike an appropriate balance between closely-held and minimalist arrangements, on the one hand, and the public marketing of complex arrangements, on the other. We have concluded that the proposed Ontario statute should expressly exclude from its purview timeshare arrangements that involve a minimal number of timeshare interests or that are designed so as to run for a minimal term, or both. While the cutoff point for both of these restrictions is necessarily arbitrary, defining the statutory ambit by placing the minimum number of timeshare interest holders at ten would seem adequately to include within the operation of the Act offerings to the public at large while excluding arrangements between co-operating friends or relatives who might require each other's investment in order to acquire the property.

Similarly, a five year cutoff point would seem to allow for the full regulatory force of the statute to operate where the complexities of long term duration are involved, while facilitating short term arrangements where the deterioration of the timeshare structure, which might typically occur long after the arrangement was first entered into, is not likely to take place. Arrangements designed so as to last for less than five years are, in the first place, likely to entail a much smaller investment on the part of purchasers and, moreover, are more clearly understood by the consumer and thus more adequately protected by contract. Accordingly, we recommend that timeshare arrangements that consist of fewer than ten timeshares or that run for a period of less than five years should be excluded from the proposed timeshare legislation.

1303 (more than one unit); and Georgia Time-Share Act, Ga. Code Ann. §44-3-162(b) (more than one unit).

[26] Washington Timeshare Act, Wash. Rev. Code Ann. §64.36.010(11); Virginia Real Estate Time-Share Act, Va. Code §55-362; and Ariz. Rev. Stat. Ann. §32-2197.1.

[27] For example, timesharing legislation in Hawaii, South Dakota, and Nevada appears not to prescribe a minimum term.

3. REGULATION BY A NEWLY CREATED REGULATORY AGENCY

Having decided that the statutory scheme governing the timeshare industry in Ontario should be regulatory in nature, the next task is to determine the form that the regulatory entity should take. In this regard, two possibilities arise, both of which have been implemented in American state timeshare statutes. These include agencies that are otherwise constituted as real estate commissions[28] and regulatory entities that are affiliated with government departments of business regulation.[29] In Ontario, the advantages of both of these options can be combined by creating an agency responsible for the regulation of timesharing under the auspices of the Business Practices Division of the Ministry of Consumer and Commercial Relations. Such an agency, modeled on that created under the *Real Estate and Business Brokers Act*,[30] would embody a province-wide expertise in matters of commercial regulation as well as the particular expertise associated with the regulation of real estate sales.

Under the *Real Estate and Business Brokers Act*, a Registrar, appointed by the Lieutenant Governor in Council, is empowered to exercise the powers and discharge the duties conferred by the Act and the regulations made thereunder. This official is assisted in his regulatory powers by an Assistant Registrar, and operates under the supervision of the Director of the Business Practices Division of the Ministry of Consumer and Commercial Relations.[31] All decisions by the Registrar are appealable to the Commercial Registration Appeal Tribunal, which is established under the *Ministry of Consumer and Commercial Relations Act*.[32]

This structure would seem to be appropriate for the timeshare regulatory initiative for a number of reasons. First, only two new positions—that of Registrar and Assistant Registrar—would have to be created, the functions of which might well be assumed by existing personnel. The supervisory position of Director is already in existence, as is the Commercial Registration Appeal Tribunal to which any decisions made by the newly appointed Registrar could be appealed. Furthermore, the Business Practices Division of the Ministry, in its jurisdiction under the *Real Estate and Business Brokers Act* over foreign timeshare developments marketed in Ontario, has prior experience with timesharing. This Division of the Ministry is not only familiar with the timeshare concept, but has a history of dealing with and processing prospectuses submitted by timeshare developers.

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[28] See, for example, Nebraska Time Share Act, Neb. Rev. Stat. §76-1702(2), and Hawaii Rev. Stat. §514E-1.

[29] See, for example, Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.05(10) (West).

[30] *Supra*, note 15.

[31] *Real Estate and Business Brokers Act*, *ibid.*, s. 2.

[32] R.S.O. 1980, c. 274, s. 7.

Accordingly, the Commission recommends that an agency should be created within the Business Practices Division of the Ministry of Consumer and Commercial Relations for the purpose of regulating timesharing under the proposed timeshare legislation. The offices of Registrar and Assistant Registrar should be created, to operate under the supervision of the Director of the Business Practices Division, and any decision of the Registrar should be appealable to the Commercial Registration Appeal Tribunal.

The preliminary function of the Registrar would be to determine whether timeshare developments marketed in Ontario have met the requirements of the Act with respect to registration. Most timeshare statutes in the United States provide that it is unlawful for any person to sell timeshare interests unless the project is registered with the specified regulatory agency.[33] Typically, in order to register, the developer must submit an application that consists of a copy of the required disclosure statement, a description of the property, copies of all relevant instruments, financial statements, the deed to the property, copies of the escrow instructions to purchasers, the contract of purchase and sale, copies of all advertising materials, and a copy of the management agreement.[34] Thus, under the proposed Ontario scheme the first function of the Registrar would be to receive and process all such applications for registration.

Under most American legislation, the administrative agency is normally required, upon receipt of such an application, to advise the developer that the application has been received. The agency is then limited by legislation to a prescribed number of days in which it must determine whether all the documents required by the Act have been filed and whether they are complete and accurate. The time frame for such determinations varies; in South Carolina, thirty days is prescribed,[35] whereas forty-five days is the relevant period in Florida[36] and North Carolina.[37] In addition, the agency's task in this regard is facilitated by statutory provisions empowering state officials to conduct inspections of the property at the developer's expense, wherever the project is situated.[38]

Generally speaking, where the agency finds that there are deficiencies in the developer's application, it is statutorily required to notify the devel-

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[33] See, for example, Hawaii Rev. Stat. §514E-10; Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.07 (West); and S.C. Code §27-32-20.

[34] See, for example, Model Act, *supra*, note 18, §5-103; Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-123; Virginia Real Estate Time-Share Act, Va. Code §55-391; Washington Timeshare Act, Wash. Rev. Code Ann. §64.36.020; and Georgia Time-Share Act, Ga. Code Ann. §44-3-193(a).

[35] S.C. Code §27-32-190(2).

[36] Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.07(2) (West).

[37] North Carolina Time Share Act, N.C. Gen. Stat. §93A-52(a).

[38] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §76-1734(3), and Nev. Rev. Stat. §119A.350.

oper of this fact and to permit her to make corrections within a prescribed period of time. Where the developer fails to answer these deficiencies to the agency's satisfaction, she is generally permitted under American timeshare statutes to petition for reconsideration and to request that a hearing be held. At present, of course, only condominium timeshare developments for which a developer must submit a declaration and description,[39] and foreign timeshare projects that are marketed in Ontario,[40] must obtain approval before being offered to the Ontario public. Developers of foreign timeshare projects falling under the regulatory ambit of the *Real Estate and Business Brokers Act* are required to file a prospectus containing documentation similar to that required by most American timeshare statutes, as well as an affidavit of the owner as to the correctness of the prospectus.[41]

It is recommended that timeshare developments within the jurisdiction of the proposed legislation should be required, prior to being marketed within the Province, to register with the Registrar, who should be empowered to receive and process all applications for registration. As will be recalled, we have recommended that several exceptions to the requirements of the proposed Act be expressly set out in the statute, including projects that consist of fewer than ten timeshare interests, or that involve timeshares that are to run for a term of less than five years.[42]

It is further proposed that, in order to register a development and market timeshare interests, developers should be required to submit detailed information concerning the project, and that such information should be of the same general type and scope as that currently required to be filed under the *Real Estate and Business Brokers Act*. In particular, it is recommended that the following items be submitted to the Registrar: a copy of the proposed disclosure statement;[43] a brief description of the property and its amenities; the proposed financial arrangements for the project; the timeshare instruments; the contract of purchase and sale; the management

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[39] *Condominium Act*, *supra*, note 1, s. 4(2), and R.R.O. 1980, Reg. 122, s. 10.

[40] *Real Estate and Business Brokers Act*, *supra*, note 15, ss. 37-46.

[41] *Ibid.*, ss. 38 and 40. See, also, the regulation under the *Real Estate and Business Brokers Act* (R.R.O. 1980, Reg. 891, s. 22), which prescribes the contents of the prospectus.

[42] *Supra*, this ch., secs. 2(b) and (c). Reference should also be made to dispositions of timeshare interests subsequent to registration of the timeshare project, for example, the resale or gratuitous transfer of timeshare interests, or dispositions pursuant to a court order or under a mortgage. Certain statutes exempt such dispositions from requirements relating to registration with the regulatory agency, and from other requirements of the legislation dealing with such matters as disclosure, purchaser protection and warranties: see, for example, National TimeSharing Council of the American Land Development Association and National Association of Real Estate License Law Officials, Model Timeshare Act (1983) (hereinafter referred to as "NTC"), §2-102. It will be important, when drafting the proposed *Timeshare Act*, to ensure that dispositions of this kind are not caught by the regulatory net.

[43] See the discussion of adequate disclosure, *infra*, this ch., sec. 4.

agreement;[44] and such other information as may be prescribed by regulation.

Later in this chapter, we shall make recommendations concerning the protection of timeshare purchasers from loss of or injury to their interests by reason of the enforcement of liens, encumbrances or other obligations against the property. It is recommended that the developer of a timeshare property be required to file with the Registrar, in addition to the abovementioned information, satisfactory evidence of the method to be used to ensure such purchaser protection.[45]

It is further recommended that, where the developer of a foreign timeshare project applies for registration to market timeshare interests to Ontario consumers, certain additional requirements should be met. In particular, a foreign developer should be required to provide the Registrar with a statement from the administrative agency responsible for regulating timeshare projects in the jurisdiction of the *situs* of the project that the timeshare registration requirements, and the requirements governing management of the project, of that jurisdiction have been complied with. Furthermore, it is recommended that such foreign applicants be required to designate an Ontario lawyer to act as their agent for service of any legal process.

The following additional procedures are recommended with respect to registration of timeshare developments under the new Act. Upon receipt of an application for registration, the Registrar should issue an acknowledgement of receipt to the developer. Within a specified number of days after receiving the application, the Registrar should determine whether the application should be approved or rejected. If the Registrar fails to act within the specified time period and the applicant has not consented to the delay, the timeshare project ought then to be deemed to be registered. In addition, in considering whether the application has satisfied the statutory requirements, the Registrar should be empowered to inspect the premises at the applicant's expense.

Where the Registrar determines that any of the requirements contained in the legislation have not been met, he should be required to notify the applicant of the deficiencies and advise her that she has a specified number of days in which to make the corrections and refile her application. If the deficiencies in the application are not corrected within the specified period, the Registrar should serve notice of rejection of the registration, together with written reasons for such rejection, on the applicant. As a matter of course, the notice should inform the applicant that she is entitled to a hearing before the Commercial Registration Appeal Tribunal, provided

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[44] See *infra*, this ch., sec. 8.

[45] See *infra*, this ch., sec. 7.

that, within a specified number of days, she so advises the Registrar and the Tribunal in writing. Finally, it is recommended that an applicant should be required to amend or supplement her application for registration to reflect any material change in the information required under the proposed statute.

4. DISCLOSURE AND RIGHTS OF RESCISSION

As indicated previously, the nature of timesharing is such as to require that purchasers be provided with full disclosure of their rights and responsibilities, and be given adequate time to consider this information. It is therefore recommended that the new Ontario legislation should follow the American timeshare statutes in requiring that purchasers be given a disclosure statement that contains enough information to allow for adequate appraisal of the timeshare interest. Specifically, the following information concerning the timeshare project should be included in any disclosure statement: the name and address of the developer; the form of timeshare interest being offered (that is, whether it is of a fee or right-to-use nature); a brief description of the project; a general description of the units (including the form and number of units that are to be sold on a timeshare basis); the proposed schedule for completion of the timeshare development; the current or projected budget (including the projected common expense liability to be borne by the purchaser) and a statement of any services not reflected in the budget that the developer provides; the total financial obligation of the purchaser (including purchase price, maintenance fees, recreation fees and real property taxes, as well as information concerning any financing offered by the developer); a description of any liens, defects, or encumbrances on or affecting the title, or any pending action material to the timeshare project; a description of the insurance provided for the benefit of the timeshare owners; the name and address of the trustee; a schedule for refunding any funds to the purchaser if the timeshare project is not completed or if the purchaser exercises her right of rescission;[46] managerial arrangements for the timeshare project and a description or copy of the management agreement;[47] a statement as to whether the development is a participant in any timeshare exchange program, together with a copy of the timeshare exchange information statement; a statement as to title to personal property located in the units or the common areas and available for use by purchasers, and how purchasers will be assured use of personal property during the term of the timeshare arrangement;[48] and such additional information as is required by regulation.

As with similar requirements under the *Condominium Act*,[49] we recommend that the proposed statutory provisions pertaining to the disclosure statement should specify that such statements are to be delivered to purchas-

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[46] See *infra*, this sec.

[47] See *infra*, this ch., sec. 8.

[48] See *infra*, this ch., secs. 5 and 7(b).

[49] *Supra*, note 1, s. 52(1).

ers before they execute an agreement of purchase and sale. In this way, not only is the disclosure more timely, but a safeguard, additional to that of *ex post facto* rescission of the contract, is built into the scheme. Thus, adequate disclosure would not only form the basis of any rescissionary rights that the purchaser is given, but would complement such rights by ensuring that all relevant data is in the purchaser's hands prior to entering into any contract.

The new statute should also follow the *Real Estate and Business Brokers Act*[50] in requiring that, before an agreement of purchase and sale is executed, purchasers acknowledge in writing receipt of the disclosure statement and that they have been informed of their rights of rescission. The developer should be required to retain such acknowledgments for a period of three years from the date of receipt of the acknowledgment.

At present, purchasers who enter into an agreement of purchase and sale in Ontario with respect to a conventional or timeshare condominium are entitled to a ten day right of rescission measured from receipt of the disclosure statement or a material amendment thereto.[51] Likewise, purchasers of foreign timeshare interests marketed in Ontario that fall under the purview of the *Real Estate and Business Brokers Act* are entitled to a seven day period in which to rescind a sales agreement without cause, measured from the date of entering into a binding agreement of sale.[52] All of the American state timeshare statutes extend to purchasers such a rescissionary right, which varies from three days in Nebraska[53] to fifteen days in Tennessee.[54]

The Resort Timesharing Council of Canada, in its 1983 Submission to the Commission, indicated that it was "of the view that a rescission right should be granted by statute to a Timeshare purchaser",[55] and that the "ten day period presently adopted by our condominium legislation is

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[50] *Supra*, note 15, s. 39(1)(b) and (2).

[51] *Condominium Act*, *supra*, note 1, s. 52(2). But see *supra*, ch. 3, note 81.

[52] As a matter of administrative policy, the Registrar of Real Estate and Business Brokers requires that every prospectus in a foreign timeshare project include a statement that "[a] purchaser has a right to rescind and terminate any agreement for purchase of property or interest for any cause whatsoever for a period of seven days from the date of entering into a binding agreement". During that period, "all monies paid by the purchaser...will be subject to being refunded to the purchaser if termination occurs". See Directive from Mr. J.R. Cook, Assistant Registrar, *Real Estate and Business Brokers Act*, Business Practices Division, Ministry of Consumer and Commercial Relations (July, 1982).

Under the provisions of the *Real Estate and Business Brokers Act*, *supra*, note 15, s. 39(3), purchasers are entitled to a 90 day right of rescission where a copy of the prospectus has not been delivered, and its receipt acknowledged, as required by the Act.

[53] Nebraska Time-Share Act, Neb. Rev. Stat. §76-1716(1).

[54] Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-114(a).

[55] RTCC Submission, *supra*, note 19, at 3.

appropriate".[56] The Commission agrees with this view and accordingly recommends that, as under section 52(2) of the *Condominium Act*, the proposed *Timeshare Act* should provide all purchasers of timeshare interests governed by the Act with a right of rescission, to be exercised by delivery to the vendor or developer (or in the case of a foreign development, the Ontario solicitor designated as agent) of a notice of rescission within ten calendar days of receipt by the purchaser of the disclosure statement.

In addition, it is recommended that the Act should require the developer, within fifteen days of receiving a written notice of rescission, to return all payments made by the purchaser, without interest or deductions. While the recommended time periods are necessarily arbitrary, it would seem most equitable in all of the circumstances to maintain the same rules applicable to timeshare interests as are applicable to conventional condominium purchases in Ontario.

5. TIMESHARE EXCHANGE

It would appear that one of the most significant motivational factors in the purchase of a timeshare unit is the possibility of participating in some form of exchange program. One survey has indicated that 74.2 percent of timeshare purchasers enter into the transaction for the primary purpose of taking advantage of the exchange opportunities with other timeshare resorts.[57] Accordingly, it is crucial to any timeshare regulatory scheme that such purchasers receive detailed information concerning the operation of any exchange company with which their development might be associated.

A majority of American timeshare statutes require that exchange companies file annually with the regulatory agency responsible for all aspects of timeshare administration in the state. Such annual reports are required to contain detailed information concerning the operation and success rate of the exchange programs. Thus, by way of illustration, the statutes typically require that a description of the terms and conditions of the purchaser's contractual relationship with the exchange company be submitted, along with a description of the procedure that must be followed to qualify for and effectuate exchanges. In addition, a complete description of all limitations, restrictions, or priorities employed in the operation of the exchange program must be included in the annual filing, as must an explanation of the number of owners and timeshare properties eligible to participate in the exchange program and the percentage of confirmed exchanges in the preceding year. Generally, upon receipt of the annual submission of this information, the regulatory agency is empowered to determine whether it is complete before accepting the filing as submitted. Moreover, most of the state statutes require that purchasers be provided

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[56] *Ibid.*

[57] Richard L. Ragatz Associates, Inc., *Canadian Timeshare Purchasers: Who they are, Why they buy* (1981), at 16.

with detailed information concerning any exchange opportunities that are available.[58] In this way, timeshare purchasers are directly apprised of the relevant disclosure data at the outset, and can continue to inform themselves on an annual basis throughout the course of their timeshare holding.

It is recommended that a similar disclosure policy be implemented by the proposed Ontario statute. The new legislation should require that developers provide timeshare purchasers with certain specific information concerning any exchange opportunities that are being offered in conjunction with the sale of a timeshare interest. This timeshare exchange information statement should include: the name and address of the exchange company; any conditions attached to the purchaser's participation in the exchange program (such as continued affiliation of the timeshare project with the exchange program); an explanation of the optional or mandatory nature of the purchaser's participation in the exchange program; a description of the terms of the purchaser's contractual relationship with the exchange company and of the operation of the exchange program; a description of the procedure to qualify for and effectuate exchanges; the relevant participatory fees; the number of units that qualify for participation in the exchange program; the number of owners eligible to participate in the exchange program; the percentage of confirmed exchanges within the past year; where (1) the exchange company and the developer are related or do not deal at arm's length, or (2) either the exchange company or the developer, or any of its officers or directors, has any legal or beneficial interest in the other, or (3) an officer or director of either the exchange company or the developer is related to, or does not deal at arm's length with, an officer or director of the other, information concerning the nature and extent of their relationship; and where an officer or director of either the exchange company or the developer is an officer or director of the other, information concerning that fact. We further recommend that the terms "related" and "arm's length" should be defined expansively, in much the same way as, for example, "related persons" is defined in the *Bankruptcy Act* and the *Income Tax Act*.[59]

As with the majority of American statutes, it is further recommended that exchange companies be required to file with the Registrar a statement containing the abovementioned information prior to offering an exchange program to any purchaser in the Province and, thereafter, on an annual basis. The policy of annual filing is designed to ensure that information respecting the exchange companies will be accessible on a continual basis to timeshare owners and to developers for the purpose of providing timeshare exchange information to each purchaser. Of course, as the policy thrust of

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[58] See, for example, Virginia Real Estate Time-Share Act, Va. Code §55-374B; Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.18 (West); and Hawaii Rev. Stat. §514E-9.5.

[59] *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 4, and *Income Tax Act*, R.S.C. 1952, c. 148, as substantially re-enacted by S.C. 1970-71-72, c. 63, s. 251. Section 251(1) refers to non-arm's length dealings.

the statutory scheme is limited generally to disclosure, any scrutiny of the statement by the Registrar would not be based on merit.

The same procedure as that recommended for registration of timeshare developments should be followed with respect to the filing of timeshare exchange information with the Registrar. That is, within a specified number of days of receipt of the requisite information, the Registrar should be required to notify the exchange company in writing whether the application is complete. If no such notification is forthcoming, the filing should be deemed approved. On the other hand, if the Registrar determines that the required filing is incomplete, he should so advise the applicant and permit her a specified time in which to correct any identified deficiencies. In turn, where the deficiencies are not corrected, the Registrar should be empowered to serve notice of his rejection of the registration. The notice of rejection should contain written reasons for the rejection, and should advise the applicant that she is entitled to a hearing by the Commercial Registration Appeal Tribunal.

The required timeshare exchange information, to be provided by the timeshare exchange company, should be either included by the developer in the developer's disclosure statement or appended thereto. As with the disclosure statement itself, purchasers should be required to acknowledge in writing that they have received the prescribed information and have been informed of their rights of rescission.

It is further recommended that the developer and the exchange company should be jointly and severally liable for any misstatements or any misleading sales representations contained in the timeshare exchange information statement; the liability of the exchange company, however, should be limited to cases where the misstatement or misleading sales representation of the developer is based upon the exchange company's disclosure of information. By incorporating the exchange company's disclosure into the developer's disclosure statement, the hope is not only better to inform purchasers with respect to the often complex and unfamiliar operations of exchange programs, but to ensure that developers take some responsibility for policing the offerings of the exchange companies, which, after all, provide much of the incentive for purchasers.

6. MARKETING

As discussed in the first half of this Report, the most common consumer grievances with respect to timeshare developments have been related to marketing, and, in particular, have concerned the use of deceptive and overly aggressive sales practices. As indicated in the survey of existing provincial and federal legislation, such sales practices are already subject to some regulation, albeit in a scattered, non-comprehensive way.[60] The prob-

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[60] See the discussion (*supra*, ch. 3, sec. 3(b)) of the *Real Estate and Business Brokers Act*, *supra*, note 15; the *Business Practices Act*, R.S.O. 1980, c. 55; the *Competition Act*, R.S.C. 1970, c. C-23; and the *Consumer Protection Act*, *supra*, note 7.

lem, of course, is that this piecemeal approach has resulted in a legal framework in which certain sales are strictly regulated and others are essentially unregulated for no apparent reason. Accordingly, there is a pressing need for a comprehensive regulatory scheme to govern marketing practices. Any proposed legislation must not only increase the level of protection that consumers generally are afforded under existing legislation, but must rationalize and universalize the pertinent regulatory controls.

(a) False or Misleading Advertising

While the federal *Competition Act,*[61] the Ontario *Consumer Protection Act*,[62] and the Ontario *Business Practices Act*[63] all prohibit the use of false and misleading advertising in this Province, the extent to which this legislation provides effective regulation of sales practices with respect to timesharing is at best sporadic and at worst unclear. Accordingly, it would seem highly profitable to emulate many American timesharing statutes by expressly prohibiting the use of such wrongful practices in advertising as part of the proposed general regulation of abusive sales techniques. Since timesharing is a novel idea to many consumers, the initial impression created through advertisement of the concept tends to carry great weight. Some statutory provisions aimed explicitly at the control of false or misleading statements in all advertising or promotional materials would seem integral to a complete regulatory package.

The sole issue in this regard concerns the question whether to include in the legislation both a general provision prohibiting the use of such advertisements and a detailed provision that contains an express list of exemplary misrepresentations and prohibited advertising practices. The most comprehensive of the American statutes would seem to encompass both types of statutory prohibition.[64] As an illustration, the Louisiana Timesharing Act contains the following general prohibition:[65]

> No person shall intentionally, directly or indirectly, authorize, use, direct, or aid in the dissemination, publication, distribution, or circulation of any statement, advertisement, radio broadcast, or telecast concerning a timeshare property, or promotion thereof, in which the timeshare interests are offered, that contains any statement or sketch that is false, misleading, or without substantiation at the time the statement is made.

Additionally, the Louisiana statute contains a detailed section containing twenty-one specific prohibitions, which provides, for example, that no advertising for the disposition of timeshare interests shall contain any

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[61] *Supra*, note 60, s. 36(1)(a), as en. by S.C. 1974-75-76, c. 76, s. 18(1).

[62] *Supra*, note 7, s. 38.

[63] *Supra*, note 60, s. 2(a).

[64] See, for example, Tennessee Time-Share Act of 1981, Tenn. Code Ann. §§66-32-131 and 66-32-132, and Arkansas Time-Share Act, Ark. Stat. Ann. §§55-1334 and 55-1336.

[65] Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.12A(1) (West).

representation of proposed improvements without indicating that such improvements have not been completed. Moreover, advertising or promotional materials are prohibited from containing any statement concerning the availability of timeshare interests at a minimum price if the number of such low priced timeshare interests is limited and the purchasers are not so informed. Likewise, any statement misrepresenting the size, nature, extent, qualities, or characteristics of the accommodations or facilities, and any misleading or deceptive representations with respect to the contents of the timeshare instrument or documents (or the purchaser's rights or obligations under these documents) is explicitly prohibited.[66] Thus, the legislative scheme combines the use of a general prohibition of false or misleading advertising practices with specific prohibitions of the most prevalent of these advertising abuses.

The Commission has concluded that the proposed Ontario legislation should take the Louisiana statute as its model in this respect, and should contain not only a broad general provision, but a list of specifically prohibited misrepresentations. Accordingly, it is recommended that the legislation should include a general prohibitory section that, in the broadest possible language, encompasses all misleading statements in any promotional material or form whatsoever. The proposed general provision might take the following form:

> It shall be unlawful for any person, directly or indirectly, to sell or offer for sale timeshare interests in this Province by authorizing, using, directing, or aiding in the dissemination, publication, distribution, or circulation of any statement, advertisement, radio broadcast, or telecast concerning the timeshare project in which the timeshare interests are offered, that contains any statement or sketch that is false or misleading or contains any representation or pictorial representation of proposed improvements or nonexistent scenes without clearly indicating that the improvements are proposed and the scenes do not exist.

It will be noted that, unlike the Louisiana provision, we would not require the element of intent. We are also of the view, and accordingly recommend, that the proposed legislation should contain an exemption from liability for misrepresentation in favour of persons who publish advertisements that are accepted in good faith for publication in the ordinary course of their business.[67]

It is further recommended that the proposed *Timeshare Act* should include a detailed list of specifically prohibited types of misrepresentation. This list should, of course, be accompanied by the statement that it is not intended to limit in any way the generality of the broad prohibition. In addition, the specific list should be drafted so that certain acts that are not caught by the general statutory prohibition are specified. The following

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[66] *Ibid.*, §9:1131.12E (West).

[67] See the former *Combines Investigation Act* (now the *Competition Act*), *supra*, note 60, ss. 36(2) and 37(3). See, also, the Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.12A(2) (West).

language, modeled on the Louisiana statute, provides a guide to drafting some of the particularities of the specific list of prohibited advertising practices:

> No advertising for the sale or offer for sale of timeshare interests shall:
>
> (a) contain any representation as to the availability of a resale program or rental program offered by or on behalf of the developer or its affiliate unless the resale program or rental program has been made a part of the offering and submitted to the Registrar;
>
> (b) contain an offer or inducement to purchase that purports to be limited as to quantity or restricted as to time unless the numerical quantity or time applicable to the offer or inducement is clearly and conspicuously disclosed;
>
> (c) contain statements concerning the availability of timeshare interests at a particular minimum price if the number of timeshare interests available at that price comprises less than 10 percent of the unsold inventory of the developer, unless the number of timeshare interests then for sale at the minimum price is set forth in the advertisement;
>
> (d) contain any asterisk or other reference symbol as a means of contradicting or changing the ordinary meaning of any previously made statement in the advertisement in such a manner as to mislead the public;
>
> (e) misrepresent the size, nature, extent, qualities, or characteristics of the accommodations or facilities that comprise the timeshare project;
>
> (f) misrepresent the nature or extent of any services incident to the timeshare project;
>
> (g) misrepresent or imply that a facility or service is available for the exclusive use of owners if a public right of access or of use of the facility or service exists;
>
> (h) make any misleading or deceptive representation with respect to the registration of the timeshare project, the sales agreement, the purchaser's rights, privileges, benefits, or obligations under the sales agreement or this Act;
>
> (i) misrepresent the conditions under which a purchaser or owner may participate in an exchange program;
>
> (j) purport to have resulted through a referral unless the name of the person making the referral can be produced upon demand of the Registrar; or
>
> (k) advertise or represent that the Registrar has recommended the timeshare project or any of the documents contained in the application for registration.

Many of these specific provisions might, in the ordinary course of statutory interpretation, fall outside the purview of the proposed general

prohibitory section. A detailed list of specific prohibitions would seem desirable in order for the general policy directed at false or misleading advertising to be linked to the disclosure provisions and registration requirements contained in other sections of the statute. In this way, the misleading advertising provisions add to the coherence and overall structure of the legislation since they are integrated into the initial registration provisions.

(b) Regulation of Advertising and Promotional Activities

A question arises whether, in addition to the prohibition of false or misleading advertising, the proposed timeshare legislation should include some type of regulatory control or pre-screening of timeshare advertisements in order to scrutinize the quality and accuracy of developers' representations, and, as well, specific provisions aimed at the regulation of timeshare promotions.

A survey of American timeshare statutes indicates that two possible approaches are available in relation to advertisements. Some American statutes require that advertising materials be deposited with the government agency responsible for timeshare regulation prior to their dissemination or within a certain number of days after their use.[68] Others, by contrast, simply provide the regulatory agency with a discretionary right to require the submission of such materials. Thus, for example, the South Carolina timeshare legislation requires that all advertising materials be submitted to the timeshare regulatory agency upon the request of the relevant official.[69]

Both of these models are available for emulation in one form or another in Ontario. Under the *Real Estate and Business Brokers Act*, foreign projects marketed in Ontario are required to deposit their advertising materials with the Registrar for approval prior to their use.[70] On the other hand, under the *Securities Act* the Ontario Securities Commission is given the discretionary right, under certain circumstances, to require a dealer to deliver to the Commission copies of all advertising and sales literature used in connection with trading in securities.[71] The Commission may, after giving the registered dealer an opportunity to be heard and upon being satisfied that the dealer's past conduct with respect to the use of advertising affords reasonable grounds for belief that protection of the public requires it to do so, order that the dealer submit its advertising and sales literature at least seven days before dissemination.[72]

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[68] See, for example, Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.11(1) (West) (10 days prior to use), and Arkansas Time-Share Act, Ark. Stat. Ann. §55-1335 (within 10 days after use).

[69] S.C. Code §27-32-20.

[70] *Real Estate and Business Brokers Act*, *supra*, note 15, s. 45.

[71] *Securities Act*, *supra*, note 1, s. 49(1).

[72] *Ibid.*

A third possible approach may be found in the *Travel Industry Act*,[73] section 15 of which gives the Registrar under the Act power, where he believes on reasonable and probable grounds that a travel agent or wholesaler is making false, misleading or deceptive statements in any advertisement, or that any advertisement contravenes the regulations, to order the immediate cessation of the use of such advertising. The Registrar's order is subject to an appeal to the Commercial Registration Appeal Tribunal.[74]

In view of the somewhat onerous nature of a requirement that all developers submit their voluminous promotional materials prior to their use in the absence of any particular grounds for suspecting abusive or otherwise undesirable content, and keeping in mind the general policy thrust of the legislation in minimizing any substantive review by the Registrar and his staff, it is recommended that the example of the *Securities Act* be followed. That is, the proposed timeshare statute should give the Registrar a discretionary right to require that advertising materials for all domestic and foreign timeshare projects be submitted for approval prior to the dissemination or distribution of such materials to the public at large. Such discretion should be exercised where the Registrar has reasonable and probable grounds to suspect, in view of the developer's past conduct with respect to use of advertising and sales promotions, that the public is in need of special regulatory intervention.

It is also recommended that the approach of the *Travel Industry Act* be followed, and that the Registrar under the proposed timeshare legislation be empowered to order the immediate cessation of the use of any false or misleading advertising materials. As under the *Travel Industry Act*, there should be a right of appeal to the Commercial Registration Appeal Tribunal.

In addition, the Commission recommends that the Registrar's power should be augmented by a broad definition of the term "advertising materials" so as to capture the wide array of advertising and promotional techniques utilized by contemporary timeshare developers. This definition should embrace promotional brochures, pamphlets, advertisements, and any other materials disseminated to the public in connection with the sale of timeshare interests. Moreover, all radio and television advertisements, direct mail solicitations, testimonials or endorsements, standardized telephone solicitations, and various offers of travel, accommodations, meals, or entertainment at little or no cost should be brought within the term's definitional scope. In this way, there will be no technical fetters on the Registrar's power.

The problematic aspects of timeshare marketing go beyond the possibility of misleading statements to include various forms of overly aggressive sales techniques. Specifically, it has become commonplace in the timeshare

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[73] *Travel Industry Act*, R.S.O. 1980, c. 509. See, also, the *Real Estate and Business Brokers Act*, *supra*, note 15, s. 47, and the *Consumer Protection Act*, *supra*, note 7, s. 38.

[74] *Travel Industry Act*, *supra*, note 73, ss. 15, 6, 7, and 8.

industry to offer potential purchasers enticements such as prizes or vacation certificates, and to attract customers through the use of sweepstakes or games of chance. As a result, various states have included in their timeshare statutes provisions aimed at controlling the more dubious manifestations of this type of promotional activity.

Although the tendency is not to prohibit such practices altogether,[75] the general policy is to make it unlawful for a developer to offer a prize or gift or other enticement with the intent to offer a sales presentation for a timeshare project, without disclosing such intent. A similar approach to promotional activities in general can be found in the federal *Competition Act*, which prohibits sales and business promotions using lotteries and games of chance or skill unless all relevant information regarding the game has been disclosed, distribution of prizes is not unduly delayed, and the selection of participants or the distribution of prizes is made on the random or skilled basis on which it is purported to be made.[76] This provision is clearly relevant to timeshare marketing techniques, although it applies only to "promotional contests" and not to other types of sales activity, such as discounts on accommodations or gifts for attending sales presentations. Additionally, since it does not expressly require that the person using the promotional device disclose its purpose, it does not in fact adequately address one of the central timeshare marketing concerns.

It is therefore recommended that the proposed Ontario timeshare legislation should, in addition to regulating advertising statements and misstatements, address the question of the use of promotional activities in the sale of timeshare interests. It should be provided expressly that it is unlawful for any person to offer by mail, by telephone, or in person a prize or gift with the intent to offer a sales presentation for a timeshare project, without disclosing such intent at the time of the offer.

Furthermore, it would seem highly advisable that a number of specific unfair practices in the operation of prize or gift promotional offers be prohibited. These should include failure to disclose, clearly and conspicuously, all rules and regulations of the promotion, including the exact nature and approximate value of the prizes, the date the offer will expire, and the odds of receiving any prize or gift. Also included in the prohibited activities list should be the failure to obtain the express written consent of any individuals whose names are used for any promotional purpose; the misrepresenting of the odds of receiving any prize or gift; the misstatement of any rules or conditions of participation in the promotional program; and the failure to award or distribute any prize or gift represented in the promotional program by the deadline specified in that program. We so recommend.

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[75] But see Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.111(2) (West), which provides that "[n]o game promotion, such as a contest of chance, gift enterprise, or sweepstakes, in which the elements of chance and prize are present may be used...in connection with the offering or sale of time-share periods".

[76] *Competition Act*, *supra*, note 60, s. 37.2, as en. by S.C. 1974-75-76, c. 76, s. 18(1).

Needless to say, the provision prohibiting specific practices should not be open to the interpretation that it is intended in any way to limit the generality of the fundamental prohibition on false or misleading statements of any kind.

(c) Referral Selling

One extremely important, and frequently problematic, technique used in marketing timeshare interests involves the developer's sales personnel obtaining from timeshare purchasers, or prospective purchasers, names and addresses of other individuals who might be interested in buying a timeshare interest. This technique, known as referral selling, is currently regulated by the *Consumer Protection Act* and the *Competition Act*. Under both statutes, referral selling is lawful only where the individuals supplying the information do not themselves benefit from doing so. While the *Consumer Protection Act* would seem to be applicable only to such contractual arrangements as timeshare vacation licences, club memberships, and co-operatives,[77] the equivalent *Competition Act* provision is general in scope and therefore regulates all forms of timesharing.[78]

Because the referral selling technique is quite commonplace in timeshare sales, it would not be illogical to include some provision governing this practice in any new timeshare legislation. In this way, the regulatory net cast over the timeshare industry would be as complete as possible. Nevertheless, given that the *Competition Act* not only covers all timeshare sales in Canada but reflects perfectly the policy with respect to referral selling that we believe the Ontario Legislature ought to pursue, duplication for the sake of completeness in a provincial statute would seem unnecessary. Although haphazard, the existing law does provide for the general legal environment in which the timeshare industry has existed until now, and that will continue to underlie any specifically designed timeshare legislative scheme. In the particular instance of referral selling, the general legal background provided by the *Competition Act* would seem to control any potential abuse in a satisfactory manner.

Accordingly, it is not recommended that the proposed *Timeshare Act* should contain provisions regulating referral selling; rather, so long as the federal *Competition Act* continues to regulate referral selling in the current manner, this technique should be regulated under that Act.

(d) Licensing of Timeshare Sales Personnel

At present, all sales personnel for freehold and leasehold timeshare interests situated in Ontario must be registered real estate agents. As well, all salespersons marketing foreign timeshare interests to purchasers in Ontario must, in order to enter into any sales contract, be either registered real estate

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[77] *Consumer Protection Act*, *supra*, note 7, s. 37(3). See *supra*, ch. 3, sec. 3(b)(iv).

[78] *Competition Act*, *supra*, note 60, s. 36.4, as en. by S.C. 1974-75-76, c. 76, s. 18(1).

brokers in Ontario or have appointed a registered real estate broker as their sales representative.[79] The issue to be considered in this section of the chapter is whether the proposed timeshare legislation should require that all sellers of timeshare interests be registered under the *Real Estate and Business Brokers Act*, regardless of the legal form or *situs* of the interest or project.

In the United States, the various state statutes seem to follow two alternative routes. One such possibility is represented by the Florida legislation, which requires that all sellers of timeshare interests must be licensed real estate brokers or salespersons in the state.[80] On the other hand, certain states follow the approach of the South Carolina legislation, which requires that any person desiring to act as a seller of timeshare interests must pass a special timeshare examination prepared by the state's Real Estate Commission and, in addition, must be employed by a licensed South Carolina real estate broker.[81] A slight variation on this approach is provided by the Washington Timeshare Act, which requires that, except for persons registered as licensed real estate brokers or salespersons, persons selling timeshares must register under the Act, in which case they may be required to demonstrate sufficient knowledge of the timeshare industry and governing legislation, but need not necessarily pass a special examination.[82]

The Legal and Legislative Committee of the Resort Timesharing Council of Canada has expressed the view that timeshare sales agents should, on the South Carolina model, be required to take a prescribed course and pass a special examination on timesharing rather than be required to register as real estate sales agents. However, unlike the position in South Carolina, the Committee would not require that sales agents be employed by a real estate broker. The Committee expressed its opinion with respect to licensing procedures for timeshare sales personnel as follows:[83]

> It is our view that special consideration should be given to the licencing requirements under the Timeshare Act in Ontario for sales persons involved in the marketing of Ontario projects. Although many Timeshare plans do technically involve the sale of an interest in land, a Timeshare sale is really more akin to the sale of a vacation and therefore the training and licencing requirements of a travel agency representative is probably more appropriate than the licencing requirements under the Real Estate and Business Brokers Act. Legislation should, of course, cover the original sale and resale qualifications.

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[79] *Real Estate and Business Brokers Act*, *supra*, note 15, s. 39(1)(c).

[80] Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.20(1) (West). See, also, North Carolina Time-Share Act, N.C. Gen. Stat. §93A-40, and Georgia Time-Share Act, Ga. Code Ann. §44-3-192.

[81] S.C. Code §27-32-180.

[82] Washington Timeshare Act, Wash. Rev. Code §64.36.070.

[83] RTCC Submission, *supra*, note 19, at 3 and 7-8.

> The Council might be of assistance in the preparation of a prescribed course of studies which would impart the essential and basic knowledge about Timesharing in its various aspects so as to enable a prospective sales person to properly present the product to the public. The Council might also assume some self regulatory responsibility in the presentation of prescribed courses for sales people.
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> ....
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> As indicated above, we feel that a real estate licence is inappropriate for a Timeshare sales person. It has been the almost universal experience of Timeshare developers that real estate agents do not succeed as Timeshare sales persons. An employee of an Ontario Timeshare developer with respect to a project which has met all filing requirements of the Act should be authorized to sell Timeshare intervals. It may well be that a course should be completed to confirm that such sales person has a sound understanding of the Timeshare concept and an examination passed with respect to same but the requirements of real estate licencing agent are inappropriate.

In the Commission's view, the Committee makes a strong point as to the inappropriate nature of real estate expertise in the timesharing context. Accordingly, it is recommended that, in order to ensure sufficient expertise, some kind of special licensing requirement should be implemented for timeshare sales personnel. In this respect, the South Carolina model may prove extremely effective. The Registrar should be given the statutory power to devise and administer a special timesharing examination whereby individuals could qualify as timeshare salespersons.

With respect to the question whether timeshare salepersons should be required to be employees of a broker under the *Real Estate and Business Brokers Act*, it should be noted that it is important not only to ensure expertise, but also to provide for the possibility of disciplinary action; in the latter respect, the controls and ethical standards built into the *Real Estate and Business Brokers Act* are highly appropriate to timeshare marketing. It is recommended therefore that, subject to the following proposal, in order to function in Ontario timeshare salespersons should be required to be employees of a registered real estate broker.

We have also concluded that, alternatively, the proposed legislation should allow licensed timeshare salespersons to be employees of a timeshare developer who has complied with the registration requirements of the *Timeshare Act*, rather than of a real estate broker, provided that such salespersons are engaged in selling timeshare interests only in their employer-developer's projects. In the case of conduct on the part of such salespersons requiring disciplinary action, the Registrar should be entitled to revoke or suspend their right to sell timeshare interests.

Moreover, the legislation should expressly stipulate that, where a timeshare salesperson is the employee of a developer, the developer is legally responsible for any actions or statements of the timeshare salesperson in connection with the marketing and sale of timeshare interests. In this way, not only would the developer be subject to civil action under the ordinary

law, but the Registrar, pursuant to recommendations made in a later section of this chapter,[84] would be entitled to revoke or suspend the right of the developer to sell or otherwise deal with the timeshare interests where his salespersons have contravened the provisions of the *Timeshare Act* dealing with marketing.

This approach would, we believe, allow timeshare salespersons to function in their own limited area of expertise without having to qualify as real estate agents, while ensuring that they are ultimately backed by some more substantial authority.

7. PURCHASER PROTECTION PRIOR TO CLOSING, AT THE TIME OF CLOSING, AND SUBSEQUENT TO CLOSING

As already discussed, perhaps the most serious problem confronting timeshare purchasers, and particularly purchasers of right-to-use types of timeshare interests, is the possibility of the developer encountering financial difficulties. For example, in the absence of adequate safeguards, certain timeshare purchasers risk losing whatever payments have been made towards the purchase price of their timeshare interests. This problem is of central concern to consumers not only before the closing of the sale of a timeshare interest, but also at the time of closing and after the transaction has been completed and the timeshare arrangement is in effect. Indeed, it is of equal concern to developers, in that well known cases of project failures and unprotected purchasers have tended to hurt the reputation of the industry as a whole.

(a) Protection Prior to Closing

Under the present state of the law, purchasers are in a somewhat precarious position with respect to payments made to the developer pending completion of the sale of a timeshare interest. Of course, where the timeshare holding is structured as a property right rather than a mere contractual interest, the doctrine of equitable conversion is triggered upon signing the agreement of purchase and sale, so that the developer/vendor is made a constructive trustee for the purchaser pending completion. Nevertheless, even in this optimal situation, the developer is not required to keep any prepaid funds in a segregated account.[85] Thus, although the purchaser's proprietary right may well give him some priority over contractual creditors in the event of the developer's bankruptcy, the developer is not prevented from dissipating all of the available funds during the course of his financial difficulties leading to bankruptcy. In addition, it goes without saying that purchasers of a right-to-use type of timeshare interest are at even greater risk with respect to any deposit or instalment payments, since the developer is

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[84] *Infra*, this ch., sec. 10(b).

[85] But see the *Condominium Act*, *supra*, note 1, s. 53.

not considered in such cases to be holding these funds in any trust capacity. In our view, there is an obvious need to require by statute the segregation and insulation of funds paid by way of deposit or instalment so that those funds are available to the purchaser in the event of the developer's financial failure.

Accordingly, we recommend that all monies paid in respect of the purchase price of a timeshare interest should be held in trust and released only in accordance with the recommendations that follow.

(i) Uncompleted Projects

It is commonplace for timeshare projects to be marketed before they have been completed and the facilities have been made ready for use. As is evident, this situation contains an intrinsic danger that a purchaser's investment in the timeshare property may be lost if the developer is unable to complete the project because of financial or other difficulties. Accordingly, there is a need for purchaser protection not only in the context of the agreement of purchase and sale, but during the period pending actual completion of the construction of the development.

There are several possible ways of approaching this problem. A number of American timeshare statutes have created a somewhat complex scheme in which a developer who files with the regulatory agency an application with respect to a project that has not been substantially completed must also file such items as a verified statement showing all costs involved in completing the project, an estimation of the time of completion, satisfactory evidence that he has sufficient funds to cover all costs, and a payment and performance bond covering the entire cost of construction. Furthermore, this type of legislation generally requires that, where purchasers' funds are to be utilized for construction, the developer must file an executed copy of an escrow agreement under which purchasers' funds may be distributed during the course of the project only in proportion to the value of the work completed. Additionally, following completion of the construction, the balance of the purchasers' funds is required to be held until the developer provides satisfactory evidence that the period for filing construction liens has expired.[86]

An alternative way of approaching this problem, and a somewhat simpler form of regulation, would be to require a developer who enters into an agreement to sell a timeshare interest in a project that has not been substantially completed to deposit in escrow all of the purchasers' payments until the project is substantially complete.[87] In the American statutes that

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[86] See, for example, Model Act, *supra*, note 18, §5-103(c); Nev. Rev. Stat. §119A.34B; and S.C. Code Ann. §27-32-140.

[87] For illustrations of this type of straightforward, but effective, scheme, see Georgia Time-Share Act, Ga. Code Ann. §44-3-176, and Arkansas Time-Share Act, Ark. Stat. Ann. §50-1317.

pursue this regulatory route, the applicable government agency is given the discretion to accept some alternative financial assurances, including a performance bond or an irrevocable letter of credit in an amount equal to the cost of completing the project. This discretion is exercised, of course, where the developer is financially sound but his assets are somewhat non-liquid, such that use of the purchasers' funds is a convenience that is not outweighed by the risk.

The Legal and Legislative Committee of the Resort Timesharing Council of Canada supports the latter regulatory approach. The Committee has indicated its view that all monies paid by purchasers prior to substantial completion of a timeshare project should be held in trust until the project has been substantially completed and a non-disturbance agreement has been obtained from all lenders claiming any secured interest against the project. Alternatively, the members of the Committee suggested that the purchasers' funds might be released for the developer's use if the developer deposits with the appropriate official a letter of credit or a bond in the amount of such deposits. Specifically, the Committee recommended that deposits be held in escrow until:[88]

> (i) the developer has deposited either a Letter of Credit or a Bond with the appropriate authority which would be sufficient to insure the return of all such deposits if the project for any reason, does not proceed, or,
>
> (ii) until the construction of the project, including all amenities promised in the Disclosure Statement, has been substantially completed, as verified by the certificate of a professional engineer, or an architect registered in Ontario, and
>
> (iii) a Non-Disturbance Agreement has been obtained from all lenders claiming any secured interest against the project.

The Commission endorses the substance of this proposal. Accordingly, it is recommended that, subject to the following recommendation, monies paid by a purchaser on account of the purchase price in respect of a timeshare development that is not complete should not be released from trust until the timeshare property is "substantially completed", and until the developer complies with the requirements to be recommended in the following section of this chapter with respect to the protection of purchasers at the time of closing.

Following the example of many American statutes, it is further recommended that the Ontario legislation should provide that, as an alternative to the holding of all funds in trust pending substantial completion, the Registrar be given the discretionary power to accept other financial assurances from the developer. Of course, such assurances should be of a type that would ensure that purchasers can be satisfied in case of developer failure

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[88] RTCC Submission, *supra*, note 19, at 2.

prior to completion of construction. The statute should therefore stipulate that a performance bond or irrevocable letter of credit in the amount of the purchasers' deposits are the only assurances that will be acceptable to the Registrar in exercising her discretion to release the trust funds prior to substantial completion.

The term "substantial completion" should be defined in the proposed timeshare statute to mean that all amenities, furnishings, appliances, structural components and mechanical systems of the building are completed and provided for as represented in the disclosure statement. In addition, the premises should be certified as ready for occupancy, as evidenced by the issuance of an occupancy permit by the appropriate municipality or other local government department. In this way, if the construction of the project is not substantially complete at the time of closing, any payments made by purchasers could be returned to them by the developer.

(ii) Completed Projects

A person who agrees to purchase a timeshare interest in a project that is substantially complete at the time of signing the agreement to purchase is not so precariously situated as a person who agrees to purchase an interest in an incomplete development. Nevertheless, as we have noted, the possibility of the developer's insolvency in the period prior to the closing of the transaction places the purchaser's deposit or instalment payments at risk. This is particularly so in the case of right-to-use purchasers, as the developer is not considered to be holding their payments in trust for them. Moreover, even though a purchaser of an ownership type of timeshare interest may be able, in the event of the developer's bankruptcy, to compel a conveyance of the timeshare interest by the trustee in bankruptcy, it might be argued that he should not be required to proceed with the purchase of an interest in a development whose management may well be precarious when he would prefer to have resort to the payments made on account of the purchase price—payments that, if not held in trust, may have been dissipated by the developer prior to closing. The question that arises, therefore, is what sort of legislative protection is required in respect of deposits and other monies paid on account of the purchase of a timeshare interest in a completed project.

The Legal and Legislative Committee of the Resort Timesharing Council of Canada, in its Submission to the Commission, took the following position with respect to this issue:[89]

> In the case of deposits given with respect to the purchase of Timeshare intervals in completed projects—it is clear that such funds should be held in escrow until the rescission rights of a purchaser have expired—and have not [been] exercised and a Non-Disturbance Agreement has been obtained from all lenders claiming any secured interest against the project.

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[89] *Ibid.*

Some American timeshare legislation, however, goes further and, recognizing that the dangers inherent in the potential insolvency of a developer may well survive the exercise of the purchaser's rights of termination, require that all monies received on account of the purchase price be held in trust pending completion of the transaction and be released only in specified circumstances, which include the exercise of a statutory right of cancellation, the valid termination of the contract according to its terms, and default by the purchaser in the performance of her obligations under the contract.[90]

The Commission agrees with this approach, and accordingly recommends that monies paid on account of the purchase price of a timeshare interest in a project that is substantially complete should be held in trust pending the closing of the transaction. However, the proposed timeshare statute should specify that the purchaser is entitled to a refund should she exercise her right of rescission, and that, in the case of termination of the agreement or default in performing an obligation under the terms of the agreement, monies held in trust should be released in accordance with the terms of the contract.

(b) Protection at the Time of Closing

(i) Introduction

At the time of closing, the timeshare property may be subject to encumbrances such as a blanket mortgage, construction liens, or tax liens. Moreover, there may be executions filed in the sheriff's office against the developer as owner of the property. All timeshare purchasers, regardless of the form their timeshare interest takes, assume a risk that their interest could become subject to a forced sale if, at the time of closing, the timeshare property is subject to such an encumbrance. For example, where the property is subject to a blanket mortgage, a default by the developer in meeting the mortgage payments could result in an action for foreclosure and sale of the property, notwithstanding the outstanding timeshare interests. Whereas purchasers of ownership timeshare interests might choose to redeem the mortgage in order to avoid foreclosure by the mortgagee, this involves a substantial financial commitment. Should they decide not to proceed in this way, they would be entitled to only a *pro rata* share of any surplus remaining after the mortgagee has been satisfied from the proceeds of the sale of the property.

Non-fee timeshare interest holders are in an even less enviable position. Of these, only leasehold timeshare owners may register their interests on title, while the holders of purely contractual timeshare interests remain completely unprotected. As a result, purchasers of such interests stand to

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[90] See, for example, Hawaii Rev. Stat. §§514E-16 and 514E-17. The latter provision also provides for the disbursement of the purchaser's funds to pay for construction under specified conditions.

lose their entire investment in the event of a foreclosure. The only possible recourse would be by way of a contractual claim against the developer, which could only be satisfied after the mortgagee has been paid in full and all secured creditors have been dealt with.

Almost all jurisdictions that have enacted comprehensive timeshare legislation have moved in some direction to protect timeshare purchasers from such problems. The underlying purpose of all timeshare regulation in this context is to ensure that timeshare purchasers are afforded the right to quiet possession during the term of the timeshare arrangement. The specific details of such regulation vary from jurisdiction to jurisdiction. Some statutes require that funds be held in escrow until one of the following requirements are met: all liens and encumbrances have been discharged; a lien payment trust has been set up; a non-disturbance agreement has been entered into and registered on title or an irrevocable letter of credit or surety bond has been posted, and, in the case of right-to-use interests, a notice of timeshare plan has been registered; or some other arrangement satisfactory to the regulatory agency has been entered into.[91] Others make it mandatory that a bond be posted or a non-disturbance agreement be registered on title, but do not require necessarily that payments made by the purchasers to the developer be retained in escrow until such requirements have been met.[92]

In British Columbia, the legislation governing timeshares addresses the problem of encumbrances on title at the time of sale by linking purchaser protection with the requirement that the developer file a prospectus with the regulatory agency. The agency is not authorized to accept a prospectus for filing where the property is subject to a mortgage, lien, or other encumbrance, unless one of several conditions has been met. These include the existence in the mortgage or other encumbrance of an unconditional provision that the purchaser of each timeshare interest can obtain free and clear title; the entering into of an irrevocable agreement that the entire sum paid by each purchaser shall be held in escrow until the encumbrance has been released; the placing of title to the property in trust until a proper release is obtained; or compliance with any other alternative that the regulatory agency may deem acceptable.[93] One such acceptable alternative would, of course, be the furnishing of a bond in the amount of any outstanding lien or encumbrance.[94]

(ii) Conclusions

The Commission has concluded that the proposed Ontario timeshare legislation should incorporate specific provisions designed to afford all

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[91] See, for example, Hawaii Rev. Stat. §§514E-18 and 514E-19.

[92] See, for example, Nebraska Time-Share Act, Neb. Rev. Stat. §§76-1721 and 1740; Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-117; and Arkansas Time-Share Act, Ark. Rev. Stat. Ann. §§50-1321 and 50-1333.

[93] *Real Estate Act*, R.S.B.C. 1979, c. 356, s. 57(1), as am. by S.B.C. 1981, c. 28, s. 19.

[94] *Ibid.*, s. 57(2).

timeshare purchasers, whether of fee ownership or right-to-use interests, protection against any mortgages, liens or other encumbrances that are in existence at the time of the closing of the sale of their interest. The best recommendation would seem to be one that follows generally the example of the majority of American timeshare statutes. Accordingly, it is recommended that, where the timeshare property is subject to any encumbrances at the time of closing, all payments made by purchasers towards the purchase price should be held in trust until the developer has either discharged the encumbrances or pursued one of several possible alternative protective measures. These should include: the execution of a non-disturbance agreement and the filing of the agreement with the Registrar; the posting of security, for example, a bond or irrevocable letter of credit in a specified amount; or the making of some alternative arrangement by the developer and purchaser that is acceptable to the Registrar.

With respect to non-disturbance agreements, we are of the view that the proposed timeshare statute should incorporate a section that addresses specifically the nature of such agreements. As noted by the Legal and Legislative Committee of the Resort Timesharing Council of Canada, American courts have expressed some concern in recent years about the validity of non-disturbance agreements, with the result that any proposed legislative scheme should include a provision that expressly authorizes and validates such agreements.[95] Thus, it is recommended that the proposed *Timeshare Act* should state explicitly that a non-disturbance agreement is valid, and enforceable by timeshare owners, as against any encumbrancer by whom it is signed. Such an agreement should be defined by statute to mean any instrument by which the holder of a blanket mortgage, lien, or other encumbrance, and his successors, agree that the holder's rights in the timeshare property shall be subordinate to the rights of any owner of a timeshare interest.

It is also recommended that the proposed timeshare statute should set out some specific requirements relating to the devices of surety bonds and irrevocable letters of credit posted by developers. These devices are, generally speaking, intended to assure purchasers that funds will be available to satisfy any blanket encumbrance on the property.

Specifically, the statute should provide that any surety bond or any irrevocable letter of credit posted by the developer as security for any blanket encumbrance should be in favour of the Registrar for the benefit of the timeshare purchasers. Additionally, any such bond or irrevocable letter of credit should be in an amount that is not less than 120 percent of the remaining principal balance of every indebtedness secured by the blanket encumbrance. Likewise, the legislation should provide that the bond or irrevocable letter of credit must cover the payment of all amounts secured by the blanket encumbrance, including costs, expenses, and legal fees of the lienholder, if for any reason the blanket encumbrance is enforced. Finally, it

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[95] RTCC Submission, *supra*, note 19, at 3.

is recommended that the statute should provide that a surety bond or irrevocable letter of credit may be reduced periodically by the developer in proportion to the reduction of the amounts secured by the blanket encumbrance as the encumbrance is gradually paid off.

In addition to encumbrances that affect the real property, personal property situated in the units or the common areas and available for use by purchasers may be subject to encumbrances at the time of closing. Certain items of personal property—for example, furnishings—may be financed under some type of security agreement, such as a chattel mortgage or conditional sales contract. Moreover, it is not uncommon for items of personal property, particularly electronic goods such as television sets, VCR's and stereo equipment—to be subject to chattel leases, as leasing offers certain advantages over outright sale in terms of the servicing and replacement of such items.

Because of the danger that the developer might default in his payments under a security agreement or chattel lease, thereby entitling the creditor to repossess the chattel, and because purchasers rarely make requisitions concerning encumbrances on personal property, it is recommended that the proposed timeshare legislation should provide that any monies paid by the purchaser of a timeshare interest on account of the purchase price should be held in trust until the personal property located within the units and common areas and available for use by the timeshare purchaser is free from any security interest or other encumbrance, or until an alternative arrangement acceptable to the Registrar has been made.

This recommendation, we believe, would permit a certain degree of flexibility, while ensuring that purchasers receive the use and enjoyment of the personal property located in the project. Rather than requiring developers to discharge all encumbrances against the personal property, it would permit them, for example, to post a bond or obtain a letter of credit in the amount of the encumbrance—arrangements that, no doubt, would prove acceptable to the Registrar. Further, developers could continue the current practice of leasing electronic goods, such as television sets and stereos, provided they could assure the Registrar that such a practice was acceptable to the owners and would not jeopardize the owners' use and enjoyment of these items.

Finally, it should be noted that recommendations contained in other parts of this Report are designed to ensure the use of personal property located in the timeshare project. It will be recalled that we have recommended that the proposed disclosure statement should contain, among other things, a statement as to title to personal property located in the units or the common areas and available for use by a purchaser, and the means whereby purchasers will receive assured use of such property during the timeshare term.[96] Moreover, in a later section of this chapter, we shall make

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[96] *Supra*, this ch., sec. 4.

recommendations concerning the duties of management with respect to the maintenance and replacement of items of personal property.[97]

(c) Protection Subsequent to Closing

(i) Discharge of Encumbrances

During the term of the timeshare arrangement, the possibility exists that the common facilities or the timeshare property generally may become subject to certain encumbrances. For example, a construction lien[98] could arise against the property as a result of repairs that are made or additional facilities that are built, and the lien claimant could initiate proceedings to sell the property. Similarly, if management failed to pay the property taxes, the municipality would be entitled to a lien on the property, which could be enforced by means of a tax sale.[99]

The *Condominium Act*[100] has addressed this problem and contains remedial provisions. It provides that, while any encumbrance that would normally arise against the common elements is enforceable against all of the units and their corresponding share in the common elements,[101] any unit and common interest may be discharged from such an encumbrance by payment to the claimant of a share of the sum claimed, as determined by the proportions specified in the declaration for sharing the common interests.[102] Certain timeshare statutes in the United States contain comparable provisions.[103]

In order to guard against the possibility that the entire timeshare property could be sold to satisfy any encumbrance that might arise subsequent to closing, it is recommended that the proposed Ontario *Timeshare Act* should contain a similar provision. The Act should provide that, if an encumbrance becomes effective against more than one timeshare owner in a timeshare project, any timeshare owner is entitled to a release of her timeshare interest from the encumbrance upon payment of the amount of the encumbrance attributable to her timeshare interest. The amount of such

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[97] *Infra*, this ch., sec. 8.

[98] See *Construction Lien Act, 1983*, S.O. 1983, c. 6.

[99] See *Municipal Act*, R.S.O. 1980, c. 302, s. 369.

[100] *Supra*, note 1.

[101] *Ibid.*, s. 7(7) and (8).

[102] *Ibid.*, s. 7(9).

[103] See, for example, Model Act, *supra*, note 18, §4-109; Nebraska Time-Share Act, Neb. Rev. Stat. §76-1721; Tennessee Time-Share Act of 1981, Tenn. Code Ann. §66-32-117; Virginia Real Estate Time-Share Act, Va. Code §55-381; Arkansas Time-Share Act, Ark. Stat. Ann. §50-1321; Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.19 (West); and Georgia Time-Share Act, §44-3-180. All of these provisions, with the exception of §4-109 of the Model Act, pertain to both fee and non-fee timeshare interests.

payment should be in the same proportion that the timeshare owner's liability bears to the liabilities of all timeshare owners whose interests are subject to the encumbrance. The legislation should further require that, upon receipt of the payment, the holder of the encumbrance shall promptly deliver to the timeshare owner a release of the encumbrance covering that timeshare interest. Finally, the Act should state clearly that a timeshare owner is not permitted to contract out of the protective provisions proposed above.[104]

(ii) Additional Protections

Once the purchase of a timeshare interest has been completed, there is a significant difference between the protection provided at common law for a fee ownership interest holder and that afforded most types of right-to-use interest holders. While timeshare fee owners and leasehold owners have a proprietary right that can be registered on title, there is a particular need to provide some statutory protection for right-to-use timeshare purchasers during the currency of the timeshare term. Since projects in which the timeshare interests are of a right-to-use nature maintain ownership in the developer, it would appear that any creditor of the developer who obtains judgment may legally force the sale of the property and divest the purchasers of their timeshare interests. The non-proprietary nature of right-to-use interests effectively places the holders of such interests in a highly vulnerable position *vis-à-vis* third party creditors. Moreover, since timeshare interests of a purely contractual nature are not registrable under current schemes of title registration, the developer might sell the property to a good faith purchaser without notice of the timeshare interests. Such a purchaser, of course, would acquire the property free and clear of any such outstanding contractual interests. Although the timeshare interest holder would retain her right to bring an action for breach of contract against the developer, such recourse would be less than satisfactory where the developer is insolvent.

In light of the foregoing, the purchaser protection provisions that have been recommended up to this point would seem to be inadequate for the total protection of right-to-use interest holders. Accordingly, we turn now to consider a number of additional protections that might be afforded under the proposed *Timeshare Act*.

a. Registration of Timeshare Interests on Title

Perhaps the best way of equalizing the position of right-to-use and proprietary timeshare purchasers is to provide that any contractual or right-to-use timeshare interest may be registered on title. Registration has the effect of giving notice of the outstanding interest to all persons claiming any interest in the land subsequent to the time of registration. In addition, registration under the *Registry Act* ensures that, unless there has been actual

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[104] In this respect, see *Re 511666 Ontario Ltd. and Confederation Life Insurance Co.* (1985), 50 O.R. (2d) 181, 35 R.P.R. 293 (H.C.J.).

notice of a prior unregistered interest, priority of interest will be on the basis of priority of registration.[105] Unfortunately for right-to-use purchasers, the *Registry Act* and the *Land Titles Act* both provide that only instruments evidencing an estate or interest in land may be registered.[106] Although leasehold interests are registrable, under both statutes purely contractual rights such as licences or club memberships would be excluded from both registration schemes. Accordingly, in the absence of alternative safeguards, right-to-use interests are unprotected by the deemed notice and priority provisions of the Province's two registration systems, and would not be preserved in the event that a third party purchaser bought the property without notice, or where the property became the subject of a forced sale due to the developer's default on a financial obligation for which the property provided security.

A number of American timeshare statutes expressly provide for the registration on title of all forms of timeshare interest.[107] Generally speaking, this is accomplished by including in the timeshare legislation a provision stating explicitly that both ownership and non-ownership (or contractual) forms of timeshare interests constitute "real estate" and that they may be registered on title. Many statutes go on to provide that timeshare interests may not be rejected for registration under the applicable land registry legislation because of their nature or duration. Some express link is then often made to the particular jurisdiction's land registration statute in an effort to reinforce the notion of registrability.

The Commission recommends that a provision specifying that all types of timeshare interest constitute interests in land should be included in the proposed Ontario timeshare legislation. The statute should refer specifically to the *Registry Act* and to the *Land Titles Act*, authorizing the registration of both fee ownership and right-to-use timeshare interests on title by the timeshare purchaser, and providing that such interests should not be rejected for registration merely because of their nature or duration. In addition, the priorities policy of both Ontario land registration schemes should be re-emphasized in the timeshare legislation by providing that registration of a right-to-use timeshare interest shall serve to protect the holder of such an interest from any claims raised by subsequent creditors of the owner of the property.

b. Registration of Notice of Timeshare Plan

In this section, we consider whether it would be advisable, in addition to providing for the registrability of individual right-to-use timeshare

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[105] *Registry Act*, *supra*, note 5, ss. 65, 66, and 69.

[106] See *Registry Act*, *supra*, note 5, s. 1(f) and (g) for definitions of "instrument" and "land" respectively, and s. 21(1); and *Land Titles Act*, *supra*, note 6, s. 80(1). See, also, *Land Registration Reform Act, 1984*, S.O. 1984, c. 32, ss. 19(10) and 22(11).

[107] See, for example, Hawaii Rev. Stat. §514E-2(b), and North Carolina Time Share Act, N.C. Gen. Stat. §93A-42.

interests, to require that, prior to the sale of any timeshare interest and before the purchaser's payments may be released from trust, developers register on title a notice of timeshare plan. A number of American timeshare statutes have followed this route, and require that a general notice of timeshare plan be registered on title prior to the sale of any timeshare interest. The Oregon timeshare legislation sets out the effect of registering such a notice as follows:[108]

> When a notice of timeshare plan is recorded, any claim by the developer's creditors and any claim upon or by a successor to the interest of the titleholder who executed the notice shall be subordinate to the interest of the timeshare owners if the sale is closed after the notice is recorded. The recording of notice shall not affect:
>
> (a) The rights or lien of a lienholder whose lien was recorded before the notice of timeshare plan;
>
> (b) The rights of a person holding an option in the timeshare property if the option was recorded before the notice of timeshare plan; and
>
> (c) The rights or lien of a lienholder having a recorded purchase money mortgage, recorded purchase money trust deed or recorded purchase agreement on the timeshare.

Like the Oregon statute, the Hawaii timeshare legislation provides that, where a notice of timeshare plan is registered, any claims made by subsequent creditors or purchasers of the property will be subordinate to the interests of the timeshare holders.[109] However, the Hawaii statute does not make mandatory the registration of a notice of timeshare plan in all circumstances. Rather, where the timeshare property is subject to blanket liens, registration of a notice of timeshare plan is but one of several alternative requirements to be satisfied before purchase monies can be released from escrow, and it is only available where non-fee timeshare interests are involved. Thus, in order to protect right-to-use timeshare purchasers, the Hawaii statute requires, as a condition of escrow closing, that developers: (a) register a notice of timeshare plan on title and either obtain non-disturbance agreements from blanket lienholders or post a security bond or irrevocable letter of credit acceptable to the regulatory agency; (b) transfer title to the property to a trustee; or (c) satisfy the requirements of any alternative arrangement acceptable to the regulatory agency.[110]

In similar fashion, the Florida Real Estate Time-Sharing Act requires that, in the case of right-to-use timeshare projects, escrow shall not close until a "non-disturbance and notice to creditors instrument" is executed

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[108] Or. Rev. Stat. §94.885(2).

[109] Hawaii Rev. Stat. §514E-21.

[110] *Ibid.*, §514E-19(b).

and registered on title.[111] The legislation provides that this instrument must "contain language sufficient to provide subsequent creditors of the developer and interest holders with notice of the existence of the time-share plan and of the rights of purchasers and shall serve to protect the interest of the time-share purchasers from any claims of subsequent creditors".[112] Not only must such an instrument be registered and a copy provided to each purchaser at the time the purchase agreement is executed, but the Florida statute requires that any lease, assignment, mortgage, or other transfer state that the transferee of the timeshare property "will fully honor the rights of the purchasers to occupy and use the accommodations and facilities as provided in their original contracts and the time-share instruments".[113]

The Commission has concluded, and therefore recommends, that the proposed Ontario timeshare legislation should require that, prior to the closing of the sale of any timeshare interest, whether of a fee or right-to-use nature, and before any purchase monies may be released from trust, a general notice of timeshare plan should be registered on title. A notice of timeshare plan should be defined by the legislation to mean an instrument, executed by the developer, that provides notice of the existence of a timeshare project and of the rights of the owners. The notice should include: (a) a legal description of the timeshare property; (b) the name or other identification of the timeshare project; (c) a copy of the timeshare instruments; (d) a scale drawing showing the boundaries of all units and common areas, and a designation by letter, number, name or other device or any combination thereof of all units; (e) the nature, duration, and number of timeshare interests and a designation by letter, number, name or other device, or any combination thereof, of all timeshare interests; (f) the method for determining an owner's liability for common expenses; (g) any restrictions on the use, occupancy, or alienation of a timeshare interest; and (h) such other information as may be required by the regulations under the proposed Act.

The legislation should further provide that, where a notice of timeshare plan is registered, any claim arising subsequent to such registration shall be subordinate to the claims of timeshare interest holders. Moreover, it is recommended that the Ontario *Timeshare Act* should stipulate that, once a notice of timeshare plan is registered, any third party purchasers or mortgagees of the property shall be deemed to have full notice of the terms of the timeshare interests held and be required to honour fully the right of timeshare purchasers to occupy and use the property as stipulated in the timeshare instruments.

It will be noted that, while registration of a notice of timeshare plan is a protective device ordinarily used in connection with right-to-use timeshare

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[111] Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.08(2)(c)1a.(IV) (West).

[112] *Ibid.*, §721.08(3)(c).

[113] *Ibid.*, §721.17(3).

interests only, our recommendation would make registration mandatory in the case of fee-ownership types of timeshare interest as well. Although it is less likely that purchasers of such timeshare interests would neglect to register their interests on title, it is not inconceivable that some such purchasers, particularly foreign purchasers of an interest in an Ontario project, would fail to do so. In our view, registration of a notice of timeshare plan would not only serve to protect the interests of timeshare purchasers during the currency of the timeshare term, but it would ensure that basic information concerning the timeshare project is on title and provide a structure that would facilitate the registration of individual timeshare interests.

c. Timeshare Trust

The device of the timeshare trust is utilized in some American timeshare statutes as an alternative or supplement to registration of particular timeshare interests and registration of a general notice of timeshare plan as methods of protecting purchasers during the currency of the timeshare arrangement. These statutes attempt to ensure that right-to-use timeshare purchasers will be guaranteed the right to quiet possession of the premises by requiring that title to the timeshare property be conveyed by the developer to a trustee and be held in trust for the duration of the timeshare term. Clearly, the risks associated with non-proprietary timeshare interests can be substantially alleviated if the property is held in trust by an independent trustee.

The trust device is most frequently utilized as an optional route for the developer to pursue. Where employed, it is generally provided that escrow of purchasers' payments may close only where either the timeshare property has been conveyed to a trustee, a notice of timeshare plan has been registered on title, or the requirements of another arrangement acceptable to the regulatory agency have been met.[114]

While the timeshare trust device is effective where utilized, it is also relatively complicated to institute. That is, in order for a trustee titleholder to be a realistic and effective option for purchaser protection, the governing statute must contain specific provisions relating to the establishment, operation, and termination of such trusts.

The timeshare trust, therefore, has not been commonplace as a mandatory aspect of timesharing, but, rather, has remained an option available to those developers who for some reason find it desirable. In effect, the combined operation of provisions that enable individual right-to-use interest holders to register their holdings on title and provisions that make mandatory the registration of a general notice of timeshare plan before any timeshare interests are marketed, provides the same protection as would the placing of title to the property in trust.

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[114] See, for example, Hawaii Rev. Stat. §514E-19(b).

Accordingly, it is here recommended that, for the sake of clarity and regulatory simplicity, the proposed *Timeshare Act* should not contain provisions respecting a timeshare trust.

8. MANAGEMENT

As indicated earlier in this Report, management of timeshare developments is generally considered to be second only to marketing in calling out for regulatory intervention in the timeshare industry. Needless to say, severe mismanagement can render a timeshare project virtually unusable for the timeshare owners, so that all other statutory protections and regulatory controls are undermined.

As in many other contexts, right-to-use purchasers are in a far more precarious position in this regard than their proprietary counterparts, since purchasers of mere contractual or leasehold interests are more dependent on the developer to ensure that the project is adequately maintained. Where the interest of the timeshare purchasers is proprietary, the problem, although less severe, is that no single owner may have a large enough interest to concern herself with the time-consuming task of guarding against mismanagement. In our view, therefore, some form of statutory intervention is clearly required.

(a) Limitation to Projects Situated in Ontario

In Ontario, at the present time, only condominium timeshare projects situated within the Province are subject to specific management requirements. For reasons that are for the most part self-evident, we recommend that the management requirements for all timeshare developments covered by the proposed *Timeshare Act* should be restricted to those developments situated within Ontario. Although there may be sound policy reasons for ensuring that the marketing of foreign timeshare projects to Ontario purchasers conforms to this Province's consumer protection standards, the case is much weaker, and the enforcement much more difficult, insofar as management of the projects is concerned.

The marketing efforts of developers intrude into the commercial life of this Province. Accordingly, regulation of sales techniques and other marketing endeavors by foreign developers in Ontario falls well within the ambit of domestic legislation generally. Management of foreign resorts, on the other hand, is an extra-territorial affair, and statutory dictation of managerial techniques employed by private parties in other jurisdictions is clearly beyond the legitimate reach of Ontario law. We have previously recommended that the application for registration of a timeshare project, as well as the disclosure statement to be delivered to prospective purchasers, should contain details of management arrangements in the case of both domestic and foreign timeshare projects. These recommendations should provide some protection to purchasers of foreign timeshares. Apart from these

requirements, it does not seem appropriate, or feasible, to attempt to regulate the way in which foreign jurisdictions do business on the basis that some Ontario purchasers may be involved.

(b) The Managing Entity and Its Responsibilities

(i) Nature of the Managing Entity

The first issue to be addressed concerns the nature of the managing entity and whether the proposed *Timeshare Act* should differentiate in this regard between fee and non-fee timeshare projects. Generally speaking, the responsibilities of the managing entity for any project would include the general maintenance and repair of the premises and facilities, the obtaining of both property and liability insurance, the preparation of an annual budget (including provision for a reserve fund), and the calculation and collection of annual assessments for the project's expenses from the timeshare interest holders.

While some American statutes distinguish between the two types of timeshare development, providing for owner management in proprietary timeshare projects and developer management (accompanied by a management advisory board consisting of timeshare right-to-use owners) for non-fee projects, this seems to be unnecessarily complicated and somewhat shortsighted. The mere drawing of such a distinction has the effect of underscoring the tenuous control that right-to-use interest holders have over the management of the project, and thus may serve to enhance rather than decrease the insecurity felt by timeshare purchasers in this regard. On the other hand, of course, intrinsic to right-to-use timeshare projects is the fact that the developer retains the fee in the property, and may well feel more strongly about preserving the managerial rights that generally accompany property ownership. Thus, some middle road must be found that both deals fairly with developers who retain the fee in their projects, and provides ongoing security for timeshare fee purchasers and right-to-use purchasers alike.

The Commission is of the view that the best model for Ontario to emulate in this respect is the Louisiana Timesharing Act, which calls for an owners' association to be created for all types of timeshare project.[115] That statute goes on to stipulate, however, that the developer of a right-to-use project may elect to retain the right to operate and maintain the timeshare property, and to maintain insurance on that property, provided that he discloses his intentions in the public disclosure statement.[116] For fee ownership projects and for right-to-use projects in which the developer declines to exercise this managerial right, the owners' association would take full responsibility for project management.

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[115] Louisiana Timeshare Act, La. Rev. Stat. Ann. §9:1131.20 (West).

[116] *Ibid.*, §9:1131.20I.

The Commission recommends that the proposed *Timeshare Act* should require the establishment of an owners' association for all timeshare projects, whether of a fee or non-fee nature. The owners' association should be the managing entity of the timeshare project. In the case of right-to-use projects, however, the developer should be given the option to retain responsibility for the operation and maintenance of the property, provided that this intention is set out in the application for registration and the disclosure statement. Responsibility for the operation and maintenance of the property should include the maintenance and day-to-day operation of the project, calculation and collection of annual assessments from the timeshare owners, and responsibility for maintaining insurance on the property.[117]

Should the developer exercise her managerial option in a right-to-use project, a timeshare owners' association should still be created. The association would, in accordance with recommendations made in a later section of this chapter, elect a board of directors, pass by-laws governing the general administration and operation of the project, and retain responsibility for the annual budget.

It is further recommended that, if the developer fails to discharge her responsibilities adequately, the timeshare owners' association should be entitled to apply to a court for an order terminating the developer's right to operate and maintain the property. Upon being granted such an order, the owners' association would assume all responsibilities for managing the property.

(ii) Creation of Owners' Association

Once it is decided that a timeshare owners' association is to be statutorily mandated for the management of all Ontario timeshare developments, some provisions are required with respect to the creation of such an association. It would seem to be advisable in this respect to follow the precedent of the *Condominium Act*, under which a condominium corporation is created automatically upon the registration of the declaration and description.[118] Under section 10(3) of the Act, neither the *Corporations Act*[119] nor the *Corporations Information Act*[120] applies to a condominium corporation.[121]

It is recommended that the Ontario timeshare legislation should simply provide that the approval by the Registrar of the timeshare application shall

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[117] See *ibid.*, §9:1131.20I(1) and (2).

[118] *Condominium Act*, *supra*, note 1, s. 10(1).

[119] R.S.O. 1980, c. 95.

[120] R.S.O. 1980, c. 96.

[121] Section 10(3) also refers to the mortmain provisions of the *Mortmain and Charitable Uses Act*, R.S.O. 1980, c. 297, since repealed: S.O. 1982, c. 12, s. 1.

create automatically a timeshare owners' association. Under the statute, this association should be declared to be a corporation without share capital, whose members are all of the timeshare owners.

(iii) Duties and Powers of the Managing Entity

a. Commencement

The first issue to be addressed in outlining the managerial duties and powers of an owners' association is that of the timing of the commencement of such duties and powers. Two alternative timing mechanisms are possible, both of which are premised on legislative precedents of one form or another. A number of American timeshare statutes provide for a "developer control period", whereby the timeshare instruments specify a period of time during which the developer or a managing agent selected by the developer shall manage the property. Generally, this developer control period is said to be open to termination by the owners' association. Although this mechanism is effective, it puts an onus on the owners' association to act affirmatively, which may be somewhat unrealistic. Although timeshare owners have a long term interest in project management, in the short term they have a limited interest in being active participants in the development's administration. As a result, the temporary developer control period may well extend indefinitely, or at least may continue until the developer engenders some controversy or starts to default on some of the managerial responsibilities.

The alternative approach is one that is pursued in Ontario's *Condominium Act* and that ensures that the owners' association will automatically assume managerial responsibilities from the developer at the outset of the project. In our view, this is the more desirable approach and, accordingly, we recommend that the proposed *Timeshare Act* should provide that an initial meeting of the owners must be held within three months of the substantial completion of the project, at which time a board of directors of the association should be elected and auditors appointed.[122] Once the developer has ceased to own a majority of the timeshare interests, a special "turnover meeting" should be required, to be held within forty-five days, at which time the owners should elect a new board of directors, and the developer should be required to transfer to the board all documents and records relevant to the management of the project.[123] As under section 26(3) of the *Condominium Act*, these would include the corporate seal; the minute book; copies of all contracts entered into by the association; architectural, structural, engineering, mechanical, electrical, plumbing, and all other relevant plans of the project; and all financial records of the association.

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[122] This provision is modeled on the *Condominium Act*, *supra*, note 1, ss. 15(1), 18(1), and 34(1). With respect to the election of auditors, see *infra*, this ch., sec. 8(b)(iii)b.

[123] See *Condominium Act*, *supra*, note 1, s. 26(1) and (3).

b. Nature of the Association's Duties and Powers

The timeshare legislation should also set out, in a general way, the duties of the owners' association with respect to the management of the project. Although it would not seem advisable to articulate such duties in specific detail, lest the detail be construed as restricting managerial flexibility, some guidelines should be set out so that the association will have a statutory basis on which to rest its exercise of powers. Accordingly, we recommend that the proposed *Timeshare Act* should provide that the general managerial duties of an owners' association shall include the following: (1) the general duty to manage, administer, and control the timeshare property and the assets and affairs of the association; (2) the general maintenance and repair of the premises and facilities; (3) the obtaining of both property and liability insurance; (4) the preparation of an annual budget, including provision for reserve funds for both capital improvements and the acquisition, maintenance, and repair of the personal property of the timeshare development; (5) the calculation and collection of annual assessments for the project's expenses from the timeshare owners; (6) the effecting of compliance by the timeshare owners with the Act, timeshare instruments, and the by-laws and rules of the association; and (7) the general exercise of all other duties conferred upon it by the timeshare instruments, so long as such duties are consistent with the proposed *Timeshare Act*.

It is further recommended that the owners' association should have duties relating to the maintenance and dissemination to timeshare owners of financial information relating to the project, as well as responsibility for arranging for a periodic independent audit.

With respect to an independent audit of the books and records of the project, prior to the sale of the first timeshare interest any audit should be within the discretion of the developer. Once there has been a sale, however, and until ten percent of the timeshare interests have been sold, the Commission recommends that the timeshare owners (not including the developer) should have the option to determine whether such an audit should take place. Under certain circumstances, it may be unnecessary to have an audit, particularly, for example, when the project is just underway. However, once ten percent of the timeshare interests have been sold, the owners' association should be required under the proposed *Timeshare Act* to arrange for an independent audit of the project's books and records, and such audits should be required to be undertaken annually thereafter.

Moreover, the owners' association should be required to send to the timeshare owners each year a copy of the financial statement together with the auditor's report, a copy of the budget for the fiscal year, and such further information respecting the financial position of the association as the by-laws of the association require.[124] The proposed *Timeshare Act* should also specify the general duty of the owners' association to maintain adequate

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[124] See *ibid.*, s. 35(11) and (12).

records on the premises of the project and to afford timeshare owners or their agents access to such records on reasonable notice and at any reasonable time.[125]

In addition to these duties, the owners' association should have the power to adopt by-laws and rules governing its own operations and the affairs of the timeshare development; to sue and be sued on behalf of the timeshare owners; and to own, acquire, encumber, maintain, and dispose of real and personal property for the use and enjoyment of the timeshare owners.[126]

With respect to the calculation and collection from the timeshare owners of assessments in respect of the expenses of the timeshare project, we recommend that, as under the *Condominium Act*,[127] the proposed *Timeshare Act* should specifically impose upon the timeshare owners a duty to contribute to the expenses of the project in the proportions set out in the timeshare instruments. The proposed Act should also provide that, where a timeshare owner defaults in her payment of any assessment, the managing entity should be entitled to an automatic lien on the timeshare interest for the unpaid amount and for all reasonable costs incurred in attempting to collect the assessment. It is also recommended that the managing entity should be required to register notice of such lien on title and to give actual notice to any registered encumbrancers. Once this is done, the managing entity should be entitled to enforce the lien in the same manner that a mortgagee may enforce its mortgage. That is to say, the management would have a right to foreclose against the defaulting timeshare owner or to exercise a power of sale. It is further recommended that, should the defaulting timeshare owner pay the arrears, the managing entity should be required to provide that owner with a discharge of the lien.

We would also include in the proposed *Timeshare Act* a provision similar to section 33(3)(c) of the *Condominium Act*. Accordingly, the proposed Act should provide that the mortgagee has the right to pay the timeshare owner's contribution towards the common expenses, and then add this amount, together with reasonable costs, charges, and expenses incurred in respect thereto, to the mortgage debt. If, after a demand, the timeshare owner fails to reimburse the mortgagee, the mortgagee should be entitled to exercise his right to sell or foreclose, as set out in the mortgage.

c. Board of Directors

Given that the owners' association is a cumbersome management vehicle, we have concluded that the model of the *Condominium Act* should be followed, in that the association's affairs, like those of a condominium

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[125] See *ibid.*, s. 21.

[126] See *ibid.*, s. 13(1).

[127] See *ibid.*, ss. 32 and 33.

corporation, should be managed by a board of directors that is elected by the owners,[128] and we so recommend. We further recommend that the board should be empowered to pass by-laws, not contrary to the proposed *Timeshare Act* or to the timeshare instruments, governing the following matters:[129]

(1) the number, qualification, election, term of office, and remuneration of the directors;

(2) the meetings, quorum, and functions of the board;

(3) the appointment, remuneration, functions, duties, and removal of agents, officers, and employees of the owners' association and the security, if any, to be given by them;

(4) the management of the property;

(5) the maintenance of the units and common elements;

(6) the use and management of the assets of the owners' association;

(7) the duties of the owners' association;

(8) the assessment and collection of contributions toward the common expenses;

(9) the borrowing of money to carry out the objects and duties of the owners' association; and

(10) the general conduct of the affairs of the owners' association.

As is the case under the *Condominium Act*, the by-laws enacted by the board of directors should be approved by the owners.[130] In addition, it is recommended that the board should be empowered to make rules in respect of the use of the timeshare property to promote the safety, security, or welfare of the owners and of the property or to prevent unreasonable interference with the use and enjoyment of the property.[131] The rules should be required to be reasonable and consistent with the Act, the timeshare instruments, and the by-laws.[132]

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[128] See *ibid.*, s. 15(1).

[129] See *ibid.*, s. 28(1).

[130] See *ibid.*, s. 28(2).

[131] See *ibid.*, s. 29(1).

[132] See *ibid.*, s. 29(2).

d. Managing Agent

Needless to say, the complexities involved in the operation of a timeshare resort necessitate that it be handled by persons with expertise in the area. As there are ordinarily no full time residents in a timeshare resort project, and as timeshare owners and board members will only be in occupancy for a limited period of time each year, the hiring of a managing agent becomes something of a practical necessity. Accordingly, it is recommended that the board of directors should be empowered to delegate the actual daily management of the project to a managing agent.

It is further recommended that, where the board of directors decides to delegate managerial responsibilities to a managing agent, the agent should be retained under a written management agreement that defines the agent's duties clearly and addresses such questions as the agent's term of employment, remuneration, and termination of services. It does not seem necessary to include statutory provisions that deal in any greater detail with the content of such management contracts, since the stipulation that the agreement be in writing and contain some minimal terms would seem to satisfy the need for owner scrutiny of the board members' actions.

Nor would it seem advisable to build into the legislation provisions allowing for direct owner participation in such decisions as the hiring or supervision of a managing agent, as this would create unnecessary confusion in the administration of a project that encompasses a large number of timeshare owners. We would, however, permit owners to discharge the managing agent, with or without cause, pursuant to a statutory "recall" provision, to be recommended in the following section of this chapter. In addition, the owners' association has the general power to elect board members and, in accordance with recommendations to be made above, would have the power to remove unsatisfactory directors.

(c) Owner Participation

(i) General

While the day-to-day management of a timeshare project would, under our recommendations, ordinarily be carried out by a managing agent under the supervision of the board of directors of the owners' association, the issue arises whether, and to what extent, individual timeshare owners should be given a right to participate in the running of the project.

We have already recommended that timeshare owners should have the right to elect directors to the board of directors,[133] to confirm by-laws passed

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[133] *Supra*, this ch., sec. 8(b)(iii)c.

by the board,[134] and to have access to and to receive certain financial information relevant to the project.[135] In addition, the *Condominium Act* contains provisions empowering owners to requisition meetings,[136] to appoint and remove auditors[137] and to remove directors.[138] The Act also requires owner approval before certain action may be taken. For example, any modification of the common elements or of the assets of the corporation must be approved by a vote of the owners, and any substantial modification of the common elements or assets must be approved by a vote of owners who own eighty percent of the units.[139] Owners are also given the right to apply to the court for an order directing the performance of any duty imposed by the Act, the declaration, or the by-laws.[140]

The Commission has concluded, and accordingly recommends, that timeshare owners should be given rights of participation equivalent to those provided by the *Condominium Act*. The proposed *Timeshare Act* might simply model these participation provisions on those already contained in the condominium legislation.

(ii) Meetings and Proxies

Generally speaking, members of condominium corporations are given the right to vote on certain matters at specifically designated meetings. Thus, for example, under the *Condominium Act*, an initial meeting of the owners is held within three months of the registration of the declaration and description, at which time the board of directors is elected and the auditors appointed.[141] Subsequently, a board of directors meeting is held to pass the by-laws and rules of the corporation,[142] and the owners are then required to meet at a specially arranged meeting to confirm the by-laws.[143] As already discussed, once the developer ceases to own a majority of the condominium units, a special "turnover meeting" is arranged, at which time the owners may elect new directors.[144] In addition, "annual" meetings are required to be held at least once every fifteen months, and each owner or mortgagee

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[134] *Ibid.*

[135] *Ibid.*

[136] *Condominium Act*, *supra*, note 1, s. 19.

[137] *Ibid.*, s. 34(1) and (4).

[138] *Ibid.*, s. 15(8).

[139] *Ibid.*, s. 38(1). Termination of a condominium may also require owner approval: *ibid.*, ss. 42 and 45. See discussion *infra*, this ch., sec. 9(b).

[140] *Condominium Act*, *supra*, note 1, s. 49(1) and (2).

[141] *Ibid.*, ss. 18 and 34.

[142] *Ibid.*, ss. 28(1) and 29.

[143] *Ibid.*, s. 28(2).

[144] *Ibid.*, s. 26.

entitled to vote is given an opportunity "to raise any matter relevant to the affairs and business of the corporation".[145] At the annual meetings, the financial statements of the corporation, the auditor's report, and other financial information are presented to the owners.[146] Likewise, at the annual meetings the owners elect new directors to fill vacancies in the board of directors and appoint auditors to hold office until the next annual meeting.[147] The Act also provides for the holding of meetings for specific purposes, including, for example, the removal of an auditor[148] or the filling of vacancies caused by an increase in the number of directors.[149] In addition to the provisions for mandatory and annual meetings, the *Condominium Act* stipulates that the board of directors may call meetings at any time and, as noted previously, that the owners themselves may requisition meetings.[150]

There is, however, a difficulty in transposing the provisions of the *Condominium Act* dealing with the holding of meetings to the timeshare context. As is evident, the majority of timeshare owners will never be in possession at any one time and may well live a great distance from the timeshare resort. For this reason, a quorum at owners' meetings will be difficult to obtain. In order to rectify this problem, it is recommended that the use of proxies should be authorized by statute. Furthermore, in the following section of this chapter, we shall recommend that the proposed timeshare legislation should expressly permit timeshare owners to utilize vote-by-mail techniques. In this way, owners would be permitted to vote on certain matters by mail rather than having to hold formal meetings in all cases.

Once it is decided that meetings such as those authorized by the *Condominium Act* should be held by timeshare owners, and that these meetings can be made more meaningful to a greater number of owners through the authorization of the use of proxies, the question arises whether the statute should address any more aspects of the meeting procedure. The *Condominium Act* contains provisions with respect to such matters as the type of meetings to be held, when they are to be held, notice of the meetings, and so on. By contrast, none of the timeshare statutes enacted in the United States deals expressly with such particulars. The reason for this is that legislative detail of this nature not only complicates the overall regulatory scheme, but intrudes into a procedural sphere that is not open to flagrant abuse and that is perhaps more efficiently left to be dealt with by the association in its by-laws. Accordingly, the Commission recommends that, with respect to formal meetings, such matters as the type of meetings to be

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[145] *Ibid.*, s. 18(1).

[146] *Ibid.*, s. 35(2) and (13).

[147] *Ibid.*, ss. 15(a) and 34(2).

[148] *Ibid.*, s. 34(4).

[149] *Ibid.*, s. 15(10).

[150] *Ibid.*, ss. 18(2) and 19.

held, when they are to be held, notice of the meetings, quorum requirements, and other related matters should be dealt with by the timeshare owners' association in its by-laws, rather than in the proposed *Timeshare Act*.

The Legal and Legislative Committee of the Resort Timesharing Council of Canada has recommended that, at a minimum, the use of proxies should be addressed in any timeshare legislation.[151] At present, the use of proxies in Ontario timeshare developments is dealt with in the timeshare documentation. Normally, it is provided in such documents that the timeshare purchasers must appoint the manager as their irrevocable proxy and that the manager will notify each purchaser about the matters that are to be decided at a particular meeting and as to how she plans to vote on these matters. The manager can thus use her own discretion in exercising the proxy unless she receives contrary instructions from a majority of the timeshare owners.

The case of *Sanrose Construction (Dixie) Ltd. v. Don-Com Venture Capital Corp.*[152] raises serious questions concerning such procedures. In that case, the Court held that an irrevocable proxy given by a condominium owner to a developer was not valid in light of the principles of agency law:[153]

> As the basis of a proxy is one of agency the agent (in this case the plaintiff [developer]) must exercise that right as directed by the principal (in this case the defendant [the condominium owner]). The proxy granted to the plaintiff in this case might be valid in so far as it permits the plaintiff to exercise the voting rights of the defendant at a meeting of owners if the defendant is not otherwise represented at the meeting. If, however, the defendant chooses to attend the meeting and be represented by an officer or director the right of the plaintiff to act as its proxy is superseded. The proxy given to the plaintiff by the defendant and expressed to be irrevocable without the consent of the plaintiff is not enforceable against the defendant.

Given this finding of unenforceability, it would seem that timeshare owners, like conventional condominium owners, must be provided with the option of either appearing at meetings personally, or appointing the person of their choice as their proxy. The practice of appointing the developer as irrevocable and permanent proxy for the timeshare purchaser no longer appears to be possible as a matter of agency or contract law. We are of the view that this prohibition is a reasonable and desirable one and ought to be enshrined in the proposed *Timeshare Act*.

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[151] RTCC Submission, *supra*, note 19, at 6.

[152] (1983), 44 O.R. (2d) 218 (Co. Ct.).

[153] *Ibid.*, at 223-24. The Court also held that the reservation, in the transfer of title, by the developer of the voting rights of the unit owner was not valid. This was regarded as an attempt to separate the voting rights in respect of the common elements from the property rights of the owners, contrary to s. 7(5) of the *Condominium Act* (*ibid.*, at 224).

The Commission has come to the conclusion that the proposed timeshare legislation should address the issue of proxies by way of an enabling provision that is broad in nature. Accordingly, we recommend that the use of proxies for voting at owners' association meetings should be expressly authorized by the proposed *Timeshare Act*. However, the Act should make it clear that a timeshare owner has the option either to appear at meetings personally or to appoint the person of his choice as his proxy. It should not be lawful to appoint a proxy irrevocably. If, for example, any specific, non-irrevocable, arrangement is to be made between a timeshare purchaser and the developer, this can be entered into as a matter of contract in the timeshare document.

(iii) Voting by Mail

As indicated previously, because timeshare owners are in residence at the timeshare development for only a short period of time each year, it would be difficult for most owners to be present if owner participation were required to take place only in the context of formal meetings. Although the use of proxies would alleviate the problem to some extent, it may be convenient for an owners' association to utilize a vote-by-mail procedure in certain cases where owner participation is required or permitted. Voting by mail would relieve timeshare owners of the obligation to attend meetings or to appoint proxies.

In the United States, two Model Acts contain provisions that permit owners to participate in the running of the timeshare development by mail.[154] The Model Timeshare Act proposed by the National TimeSharing Council, for example, includes provisions dealing with "referendum", "initiative" and "recall",[155] the main features of which are outlined below.

The "referendum" provision[156] enables timeshare owners to vote on board action by mail. Whenever the approval of owners is needed, this provision authorizes the board to mail to each owner a ballot that, among other matters, describes the board action for which approval is sought, sets out the vote of the board on the action, and asks the owners either to approve or to disapprove the action.

The "initiative" provision[157] entitles the owners to amend the timeshare documents or to take any action that the board could take. The process is initiated by delivering to the board a petition signed by owners holding at least five percent of the voting power of the association and

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[154] NTC, *supra*, note 42, and Model Act, *supra*, note 18, §§3-114 to 3-117.

[155] NTC, *supra*, note 42, §§11-105 to 11-108.

[156] *Ibid.*, §11-107.

[157] *Ibid.*, §11-106.

containing a proposal to be determined by the owners. Within twenty days of receiving the petition, the board is required to mail to each owner a ballot setting forth the language of the proposal and asking them to indicate approval or disapproval of the proposal.

Pursuant to the "recall" provision,[158] an owner may submit a petition to the board, signed by owners holding at least five percent of the voting power of the association, proposing dismissal of the managing agent. The board is required, among other things, to mail a copy of the petition and a ballot to all owners, inviting them to indicate whether they are in favour of or against dismissing the managing agent.

The Commission has concluded that similar devices should be available under the proposed Ontario legislation, as a means of both avoiding the necessity of formal meetings and encouraging owner participation in the management of timeshare projects. Accordingly, we recommend that the *Timeshare Act* should contain provisions expressly authorizing the utilization of the vote-by-mail mechanisms of referendum, initiative and recall, and should set out the procedure to be followed in each case.

With respect to the proposed "referendum" procedure, the Commission recommends that whether, and the extent to which, this procedure should be used as an alternative to formal meetings should be a matter to be determined by the owners' association and set out in its by-laws. It might be decided by a particular owners' association, for example, that certain matters should be dealt with only at formal meetings, while others could be determined by mail.

The proposed "referendum" provision should provide that, where a timeshare owner is required to vote—whether, for example, to confirm by-laws passed by the board, to replace directors, or for any other reason—the board or its managing agent should be required to mail to each owner a ballot that contains the following information: the action for which approval is sought; the vote of the board on the action; whether approval is required by the timeshare instruments or the timeshare legislation; and the number or percentage of votes required for approval under the instruments or by-laws. In addition, this ballot could be accompanied by written submissions prepared by members of the board of directors advocating approval or disapproval of the action.

It is further recommended that, within ten days after the date specified for the return of the ballots, the board should be required to examine the ballots that have been returned and determine the outcome of the vote. Moreover, the statute should stipulate that, unless specified as higher in the timeshare instruments, any matter submitted for approval by referendum should be considered to be approved only if ballots were cast representing at least ten percent of the voting power of the association. Similarly, unless

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[158] *Ibid.*, §11-108.

specified as higher in the timeshare instruments, any matter that is the subject of a referendum should be considered to be approved only if, of the ballots cast, fifty percent favored approval.

Under the proposed "initiative" provision, timeshare owners should be empowered to raise any matter relevant to the management of the timeshare project that requires owner approval, without necessarily waiting for board action to be taken. This power is comparable to the right of owners under the *Condominium Act* to requisition meetings.[159] Under that Act, upon receipt of a requisition in writing made by owners who together own at least fifteen percent of the units, the board is required to call and hold a meeting of the owners to deal with the particular matter set out in the requisition. For example, certain of the owners may feel that a particular by-law or rule should be amended, or that an incompetent director should be removed and, in order to ascertain the views of the other owners on such matters, they would requisition an owners' meeting. The proposed "initiative" provision would enable the timeshare owners to achieve the same results by mail.

It is recommended that, under the proposed "initiative" provision, any owner should be entitled to deliver to the board of directors a petition containing a proposal to be determined by the timeshare owners and signed by owners holding fifteen percent of the voting power of the owners' association, together with a written submission in support of the proposal. Further, within twenty days of receiving such a petition, the board of directors should be required to mail to each timeshare owner a ballot containing the details of the proposal. This ballot should be accompanied by a copy of the submission in support of it and, at the option of the board of directors, a written statement from the board recommending approval or disapproval of the petition. Within twenty days after the date specified for the return of the ballots, the board should be required to examine the ballots that have been returned and to determine the outcome of the vote. Furthermore, as under the "referendum" procedure, it is recommended that, unless stipulated in the timeshare instruments as being a higher percentage, any "initiative" submitted for determination of the owners should be considered to be adopted only if ballots were cast representing ten percent of the voting power of the association, and if fifty percent of the ballots actually cast were in favor of adoption of the initiative.

With respect to the proposed "recall" provision, it is recommended that, where any owner delivers to the board a petition signed by owners holding at least five percent of the voting power of the association recommending that the managing agent be dismissed, the board should be required to mail to each owner a ballot inviting them to vote on this issue. Provided that ballots are cast representing at least fifty percent of the voting power of the association and that, of these ballots, 66 2/3 percent favour discharge, the managing agent should be dismissed.

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[159] *Condominium Act*, *supra*, note 1, s. 19.

(iv) Allocation of Voting Rights

We turn now to consider the allocation of voting rights to timeshare owners. Section 22(1) of the *Condominium Act* provides that "[a]ll voting by owners shall be on the basis of one vote per unit", notwithstanding, for example, the size or cost of the unit. Furthermore, the section provides that "where two or more persons entitled to vote in respect of one unit disagree on their vote, the vote in respect of that unit shall not be counted".[160]

It seems clear that the mechanism used in the *Condominium Act* for allocating voting rights would be highly inappropriate in relation to timesharing. In the latter context, each physical unit is divided into time-bound interests in such a way that there may well be dozens of owners of each unit. To reserve but one vote for a unit would completely frustrate owner participation in the affairs of the timeshare development. Accordingly, some other, more practicable, system must be devised.

The Commission recommends that the details concerning the actual allocation of voting rights in a timeshare project should not be dealt with expressly in the proposed *Timeshare Act*. Rather, the Act should provide that the allocation of voting rights shall be set out either in the timeshare instruments or in the by-laws of the owners' association. However, the Act should deal specifically with the case where the instruments are silent and where no by-laws have yet been passed, and, in addition, should establish certain general guidelines concerning the allocation of voting rights.

We shall consider first the general statutory guidelines governing allocation. In this connection, the proposed *Timeshare Act* should provide that voting rights shall be allocated to each timeshare interest, including unsold timeshare interests held by the developer. No distinction in voting rights should be made between timeshare interests held by the developer and those held by owners other than the developer. The proposed Act should state that the number of votes allocated to each timeshare interest in either the timeshare instruments or the by-laws shall be determined according to any of the following methods:

(1) on the basis of one vote for each timeshare interest;

(2) on the basis of the size of the timeshare interest;

(3) on the basis of the cost of, and the expenses of operating, the timeshare interest; or

(4) on the basis of any other method approved by the Registrar.

In connection with the method of determining the allocation of votes, the Act should provide that, as to some matters, the vote allocated to each

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[160] *Ibid.*, s. 22(1).

timeshare interest may be determined according to one of the methods just described, and, as to other matters, it may be determined by a different method.

As we indicated above, the timeshare instruments may well be silent with respect to the allocation of voting rights, the intention being to permit the owners' association the flexibility of determining such rights pursuant to its by-laws. This silence would create a serious problem in the absence of a default provision concerning such rights in the proposed *Timeshare Act*, since it would be impossible to know the basis on which a board of directors, which would pass the relevant by-laws, is to be elected without there first being a method of determining the allocation of votes among timeshare owners. Accordingly, the Commission recommends that the proposed Act should provide that, where neither the timeshare instruments nor the by-laws contain provisions dealing with the allocation of voting rights, each timeshare interest should be allocated one vote. Should this arrangement—or, indeed, should any arrangement stipulated in the timeshare instruments or the by-laws—prove to be unsatisfactory, under our proposals it would be possible for the timeshare owners to introduce a new or different allocation of voting rights, having regard, however, to the general statutory guidelines recommended above.[161]

9. MISCELLANEOUS STATUTORY PROVISIONS

(a) Partition

In an attempt to circumvent the possibility that one co-tenant might apply for partition of the timeshare property and force a sale of the entire development, most American timeshare statutes contain provisions expressly prohibiting co-tenants from bringing such actions.[162] Partition actions are generally prohibited except as permitted by the timeshare instruments or upon termination of the timeshare project.

The Commission recommends that any comprehensive timeshare legislation introduced in this Province should deal with the question of partition. The proposed *Timeshare Act* should stipulate that no action may be brought under the *Partition Act*[163] for partition of any property governed by the timeshare legislation, except as provided in the timeshare instruments. This, then, will serve as a supplement to the waiver of partition rights

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[161] With respect to the amendment of the timeshare instruments, see *infra*, this ch., sec. 9(h). With respect to the passing of by-laws by the board of directors and their confirmation by the timeshare owners, see *supra*, this ch., secs. 8(b)(iii)c and (c).

[162] See, for example, Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.22(1); Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.7 (West); and Nebraska Time-Share Act, Neb. Rev. Stat. §76-1712.

[163] R.S.O. 1980, c. 369.

generally executed by each purchaser as part of the timeshare documentation, so that this inappropriate procedure can be eliminated from the timeshare context in all but the most truly consensual instances.

(b) Termination of the Timeshare Arrangement

At present in Ontario, the termination of a timeshare project is normally addressed in the timeshare instruments. Thus, for example, in the case of right-to-use projects, the timeshare instruments will provide that, upon the expiration of the term of the contract, the property will revert to the developer. With respect to fee ownership timeshare projects, the instruments usually provide for expiration on a set date, unless a majority of the owners vote to extend the project for a further period. Upon expiration of the term of the agreement, the owners, as tenants-in-common,[164] may initiate an action for partition and sale in order to dispose of the property and obtain their proportionate share of the proceeds.

Where condominium timeshare interests are concerned, however, the provisions of the *Condominium Act* dealing with termination are applicable and would supersede any agreement.[165] The *Condominium Act* provides for the termination of the condominium arrangement in the following circumstances: where substantial damage to twenty-five percent or more of the buildings is incurred and an eighty percent vote to terminate is passed;[166] where owners who own eighty percent of the units vote to sell or to terminate, subject to the consent of certain other interested parties;[167] and by court order.[168]

Certain problems are apparent with the present law in this area. Unless the timeshare development is governed by the *Condominium Act*, difficulties may arise if the timeshare owners or the developer decide that it is best to terminate the timeshare arrangement prior to the expiration of its term. In the case of a project that is substantially damaged by fire, for example, it might be helpful if there were guidelines as to when and how the owners or the developer could proceed to terminate the arrangement.

It is recommended that the proposed *Timeshare Act* should contain a general provision dealing with the termination of timeshare projects, and that this provision should apply to both fee and non-fee timeshare interests.

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[164] It will be recalled that, under the time span type of timeshare interest, purchasers take title to the property as tenants-in-common. With respect to interval ownership, purchasers receive two separate interests in the property—an estate for years, and, upon its expiration, a tenancy-in-common. See *supra*, ch. 2, secs. 1(a)(i) and (ii).

[165] See *Condominium Act*, *supra*, note 1, s. 61, which provides that "[t]his Act applies notwithstanding any agreement to the contrary".

[166] *Ibid.*, s. 42.

[167] *Ibid.*, ss. 44 and 45.

[168] *Ibid.*, s. 46.

The Act should provide that the timeshare project shall terminate at the end of the term of the timeshare project, as set out in the timeshare instruments, or prior to the end of the term in the following circumstances. First, termination should be available upon entry of an order by the Supreme Court of Ontario in an action brought by an owner or by the timeshare owners' association declaring that the useful life of the timeshare property has ended.[169] As under the *Condominium Act*,[170] the court, in making the order, should have to be of the opinion that termination of the project would be just and equitable having regard to the intent of the Act, the probability of unfairness to one or more owners, and the probability of confusion and uncertainty in the affairs of the association or the owners if termination is not ordered. Secondly, termination should be available where substantial damage to twenty-five percent or more of the buildings has been incurred and owners having at least eighty percent of the voting power vote to terminate. Thirdly, in the case of fee ownership timeshare interests, it is recommended that the timeshare owners should have the right to terminate the project where owners having at least eighty percent of the voting power vote to do so.

The Commission has concluded that the proposed *Timeshare Act* should deal with the sale of a timeshare property where the timeshare project is terminated prior to the end of its term. It is therefore recommended that the statute should provide that, unless the timeshare instruments stipulate expressly to the contrary, the timeshare owners' association is empowered to sell the property upon such terms and conditions as the board of directors shall determine. However, where a right-to-use project is involved, it would seem equitable that the board of directors should be required to give written notice to the developer of the terms and conditions upon which the board proposes to dispose of the timeshare property to a *bona fide* third party purchaser, and we so recommend. If, in such a case, the developer does not agree to convey the timeshare property on such terms, he should be required to purchase the owners' interests on the same terms and conditions. The purchase price, of course, should be adjusted so as to represent the percentage of the purchase price equal to the percentage that the outstanding right-to-use interests in the timeshare property represents to the total value of the property. It should also be provided that, if the board and the developer fail to agree on this percentage, it shall be determined by binding arbitration.

It is further recommended that the proposed *Timeshare Act* should contain provisions dealing with the distribution of the proceeds of sale upon the sale of the property. Where a fee ownership timeshare project is concerned, the proceeds should be distributed to each owner in accordance with her proportionate ownership in the property.[171] Where, however, the

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[169] See Louisiana Timesharing Act, La. Rev. Stat. Ann. §1131.8A (West).

[170] *Supra*, note 1, s. 46.

[171] See *Condominium Act*, *supra*, note 1, s. 44(4).

timeshare project consists of right-to-use interests, the distributive mechanism will have to take into account the value of both the developer's interest and the interest of each right-to-use owner. It is therefore recommended that, unless the timeshare instruments provide otherwise, the proceeds to be distributed to the developer and to each right-to-use owner should be calculated by multiplying the proceeds of sale of the property by a fraction, the numerator of which is the fair market value of the interest in question and the denominator of which is the aggregate of the fair market value of the interest of the developer and the interests of all timeshare owners.

(c) Binding Heirs, Successors, and Assigns

Another problem that should properly be addressed in any comprehensive legislative initiative concerns the binding of subsequent purchasers of timeshare interests to the terms of the timeshare arrangement. In particular, with respect to the tenancy-in-common form of timeshare interest, it is essential that the timeshare instruments bind not only the current owners, but their heirs, successors, and assigns. Otherwise, it will be impossible to ensure that each co-tenant's rights to occupy the unit will be restricted to a designated time period. Since a tenancy-in-common is, as a matter of property law, a concurrent interest in which there is a unity of possession, it is necessary for all co-tenants to enter into a separate agreement that delineates each owner's specific period of occupancy. In the absence of such an agreement, each co-owner would necessarily be entitled to possession of the timeshare unit at all times.

At present, developers of tenancy-in-common timeshare projects attempt to deal with this problem contractually. Normally, the timeshare instruments include a provision to the effect that all successors entitled to the timeshare property shall be subject to the covenants and agreements made by, and the obligations and duties imposed on, the predecessor in title under the instruments. In addition, the timeshare instruments generally provide that each subsequent transferee must enter into an agreement whereby she agrees to assume and be bound by all the covenants and agreements of the present timeshare owners.

While these contractual provisions are effective, there is no guarantee that they will always be included or that they will be properly drafted. Accordingly, it is recommended that the matter should be dealt with by legislation. The proposed *Timeshare Act* should include a provision modelled on that section of the *Condominium Act* dealing with the binding effect of the statute, the condominium declaration, and the condominium corporation's by-laws and rules.[172] This provision should stipulate that each timeshare owner is bound by the *Timeshare Act*, the timeshare instruments, and the owners' association's by-laws and rules. In addition, the section should stipulate that each timeshare owner has a right to the compliance by

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[172] *Ibid.*, s. 31.

the other timeshare owners with all provisions of the Act, the timeshare instruments, and the by-laws and rules. Furthermore, it should be stipulated that the timeshare owners' association, as well as every person having an encumbrance against any timeshare interest, has a right to the compliance by the timeshare owners with the provisions of the *Timeshare Act*, the timeshare instruments, and the by-laws and rules.

(d) Tort Liability

It will be recalled that the operation of common law tort doctrine can be somewhat problematic in the timeshare context.[173] Specifically, one of the disadvantages of the time span type of ownership is the possibility of co-tenants in the property being held jointly and severally liable for any injuries suffered by a third party within a unit or in the common areas of the property. In addition, it is possible that, if one of the co-owners negligently damages a unit or the common areas, expenses for repair of such damage may be assessed against all of the unit owners.

These and other related liability problems are normally dealt with as a matter of course by the insurance provisions in the timeshare instruments. Under the instruments, or under the by-laws of the owners' association, the managing entity has a duty to obtain both property and liability insurance.[174] Moreover, the timeshare instruments ordinarily include a provision making each owner responsible only for his own tortious acts or omissions.

While these limitations on tort liability provide one possible approach to the problems described above, it would seem advisable for the sake of certainty to include some specific statutory provisions dealing with these issues. Accordingly, the Commission recommends that the proposed *Timeshare Act* should contain a provision that makes each timeshare owner personally liable only for his own tortious acts and omissions, and for those of his visitors, employees and agents (to the extent that the law now provides), but not for those of the owners' association, the board of directors, or the managing agent. A statutory provision along these lines would serve to rebut the presumption that all the owners of a particular unit are jointly and severally liable for the damage or injury merely because they hold title as tenants-in-common. Furthermore, we recommend that, except as proposed above, an owner should not be liable for any damage or injury to persons or property occurring on the timeshare property merely because he is an owner.

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[173] See *supra*, ch. 2, sec. 1(a)(i).

[174] In order to take into account the fact that, where a third party is injured in a common area of the timeshare resort, all of the timeshare owners may well be liable as title holders, the Commission has recommended that the managing entity should be required to obtain property and liability insurance: see *supra*, this ch., sec. 8(b)(iii)b. In this way, the cost of dealing with any liability problems would be equitably spread among all timeshare interest holders by means of their maintenance fees.

(e) Express and Implied Warranties

(i) Express Warranties

As we indicated in our *Report on Sale of Goods*,[175] a purchaser's decision to enter into contractual relations with a seller may have been influenced by oral or other representations[176] made by the seller prior to the formation of the contract. In this section, we discuss briefly the remedies available to the timeshare purchaser where one or more of these representations is determined to be false, that is, where there has been a misrepresentation by the seller.[177] In this connection, we shall consider whether the proposed *Timeshare Act* should include provisions dealing with express warranties.

We have recently noted elsewhere that misrepresentations that induce the formation of a contract may or may not constitute a part or term of the contract.[178] This distinction between contractual and non-contractual representations, as we discuss below, has important consequences.

Breach of a representation that constitutes a term of the contract (that is, breach of an express warranty) will give rise to a right to claim damages, or to rescind the contract and claim damages, depending upon the nature of the contractual term that has been breached. The assessment of such damages, moreover, will be made with reference to the value of the performance for which the purchaser had contracted. Breach of a non-contractual representation, on the other hand, will normally give rise only to a right to claim the equitable remedy of rescission, unless the representor has been guilty either of fraud, or of negligence under the doctrine in *Hedley, Byrne*.[179] Indeed, rescission itself may be unavailable, leaving the representee entirely without remedy.[180]

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[175] Ontario Law Reform Commission, *Report on Sale of Goods* (1979), Vol. 1 (hereinafter referred to as "Sale of Goods Report"), at 135.

[176] Such representations may include advertisements, sales brochures, catalogues, or other materials.

[177] See Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) (hereinafter referred to as "Contract Law Amendment Report"), at 235, where we indicated that misrepresentation "[i]n the contractual context...means a false statement made by one party to a contract that induces another party to the contract to enter into the contract".

[178] *Ibid*. The Commission has made recommendations with respect to misrepresentation in several Reports. See Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972) (hereinafter referred to as "Consumer Warranties Report"), at 28-30; Sale of Goods Report, *supra*, note 175, ch. 6; and Contract Law Amendment Report, *supra*, note 177, ch. 12.

[179] *Hedley, Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, [1963] 3 W.L.R. 101 (H.L.).

[180] For a brief discussion of the circumstances in which the equitable remedy of rescission may be barred, see Contract Law Amendment Report, *supra*, note 177, at 237-38.

Thus, the remedies available to an injured party who has relied on a representation and entered into a contract will vary depending upon whether the representation is or is not a contractual term. Moreover, while damages may be awarded for breach of a contractual term irrespective of the seller's intent, they may be awarded for breach of a non-contractual representation only where the seller acted fraudulently or negligently.

The current test applied to determine whether a representation constitutes a term of the contract was adopted by the House of Lords in *Heilbut, Symons & Co. v. Buckleton*.[181] In that case, it was held that a mere affirmation of fact does not become a term of the contract unless it was intended to be promissory in character. As we have noted on several occasions,[182] however, this test is elusive, difficult to apply, and has been frequently criticized. Consequently, we recommended abolition of the test and enactment of a statutory provision dealing with express warranties, first in the context of consumer sales,[183] and later in the context of sales law generally.[184]

We have reached a similar conclusion in the present context of timesharing. Accordingly, we recommend that the proposed *Timeshare Act* should include provisions to address the issue of express warranties. Specifically, in our view, the legislation should contain a section that provides, in substance, as follows:[185]

> Express warranties made by a developer to a purchaser, if relied upon by a purchaser, are created as follows:
>
> (1) Any affirmation of fact or promise that relates to the timeshare interest, the timeshare property, rights appurtenant to either, area improvements that would directly benefit the timeshare property, or the right to use or have the benefit of facilities not located on the timeshare property, creates an express warranty that the timeshare interest, the timeshare property, and related rights and uses will conform to the affirmation or promise.
>
> (2) Any model or description of the physical characteristics of the timeshare property, including plans and specifications for improvements, creates an express warranty that the timeshare property will conform to the model or description.
>
> (3) Any description of the quality or extent of the immovable property constituting the timeshare property, including plans or surveys, creates

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[181] [1913] A.C. 30 (H.L.).

[182] See Consumer Warranties Report, *supra*, note 178, at 29; Sale of Goods Report, *supra*, note 175, at 135-36; and Contract Law Amendment Report, *supra*, note 177, at 235-36.

[183] Consumer Warranties Report, *supra*, note 178, at 29.

[184] Sale of Goods Report, *supra*, note 175, at 136.

[185] Provisions creating express warranties, in substantially similar terms, appear in the Model Act, *supra*, note 18, §4-111, and the Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.14 (West).

an express warranty that the property will conform to the description, subject to customary tolerances.

We have arrived at the above conclusion for several reasons. Although a timeshare purchaser would otherwise have her common law remedies,[186] described above, the enactment of a statutory provision dealing with express warranties would provide several advantages to the timeshare purchaser over the present common law remedies for misrepresentation.

First, the proposed statutory provision would eliminate the present necessity of distinguishing between contractual and non-contractual representations—a distinction that has been criticized heavily, and abandoned by the Commission in the past.

Secondly, our recommendation would ensure that the right to claim damages is available in all cases of misrepresentation. In the absence of such a provision, it will be recalled, misrepresentations that failed to satisfy the test in *Heilbut, Symons* would give rise to a right to claim damages only where the representor acted negligently or fraudulently. Where the representor acted innocently, the representee would be limited to a right to claim rescission, provided, of course, that the equitable remedy was still available in the circumstances. Thus, inclusion of a provision dealing with express warranties in the proposed *Timeshare Act* would ensure that a timeshare purchaser has a right to claim damages for breach, irrespective of the conduct of the developer.

Thirdly, as the Commission has noted elsewhere, "[t]he effect of treating every material representation as an express warranty is to expose the representor to the same measure of damages for its breach as for breach of any other term of the contract" and, therefore, "the representor could be liable for expectation and reliance losses, and for consequential as well as direct damages".[187] In the absence of a statutory provision dealing with express warranties, misrepresentations that fail to satisfy the test in *Heilbut, Symons* would give rise to a right to claim damages, if at all, for direct loss only.

We would also note that we have made our recommendations regarding express warranties notwithstanding a certain degree of overlap with other recommendations made in this Report. It will be recalled that, in an earlier section of this chapter, we recommended that the proposed Act should include both a general provision prohibiting the use of false or misleading advertising, and a detailed provision that contains an express list of prohibited misrepresentations or practices.[188] In a subsequent section of

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[186] Later in this chapter we shall recommend that the proposed legislation should provide that the civil remedies set out in the Act do not preclude purchasers from pursuing any other statutory or common law remedies. See *infra*, this ch., sec. 10(a).

[187] Sale of Goods Report, *supra*, note 175, at 140.

[188] *Supra*, this ch., sec. 6(a).

this chapter, we shall recommend a provision that would empower a timeshare purchaser to bring an action seeking damages, or injunctive or declaratory relief, against the developer or any other person subject to the Act who has failed to comply with, among other things, the provisions dealing with false or misleading advertising.[189]

This statutory cause of action would not be co-extensive with an action for misrepresentation. Although the recommendations with respect to false and misleading advertising have been expressed broadly, certain representations made by developers would not fall within the prohibition. In such a case, and in the absence of a statutory provision dealing with express warranties, the timeshare purchaser would be limited to her common law remedies for misrepresentation, which, as we have explained, might not include a right to claim damages.

In addition to the above provisions dealing with express warranties, we recommend that the proposed *Timeshare Act* should provide that neither formal words, such as "warranty" or "guarantee", nor a specific intention to make a warranty, is necessary to create an express warranty.[190] Moreover, the proposed *Timeshare Act* should provide that any transfer of a timeshare interest transfers to the purchaser all express warranties made by previous sellers.[191]

(ii) Implied Warranties

We have concluded that the proposed *Timeshare Act* should also contain provisions dealing with implied warranties. Not only are the analogous provisions of the *Sale of Goods Act*[192] inapplicable to the sale of timeshare interests, but the implied warranty against all defects contained in the Province's *Ontario New Home Warranties Plan Act*[193] explicitly excludes all dwellings "built and sold for occupancy for temporary periods or for seasonal purposes".[194] While the *Building Code Act*[195] provides some assurance that new structures have been inspected for compliance with the requirements of the Building Code, it is clear that, unlike an action for

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[189] *Infra*, this ch., sec. 10(a).

[190] See, for example, Model Act, *supra*, note 18, §4-111(b), and Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.14B (West).

[191] See, for example, Model Act, *supra*, note 18, §4-111(c), and Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.14C (West).

[192] R.S.O. 1980, c. 462, ss. 13-16. These provisions apply generally to a contract for the sale of "goods", which is defined in s. 1(1)(g) to mean "all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale".

[193] R.S.O. 1980, c. 350.

[194] *Ibid.*, s. 1(d).

[195] R.S.O. 1980, c. 51.

breach of implied warranty, any cause of action accruing to a purchaser by virtue of a breach of the Code would require proof of negligence on the part of the developer.[196]

Moreover, in the absence of statutory intervention, the common law doctrine of *caveat emptor* would apply to the sale of a completed residential structure, while a limited implied warranty of fitness for human habitation would apply to the sale of an uncompleted residential building.[197]

In view of the uncertainty and general inadequacy of the present law in this regard, we recommend that the proposed *Timeshare Act* should address expressly the issue of implied warranties and, in our view, it should do so in much the same fashion as certain of the American timeshare statutes. Accordingly, we recommend that the proposed Act should provide that a developer warrants that, in the case of a timeshare project that consists of right-to-use timeshare interests where the developer has elected to retain responsibility for the operation and maintenance of the property, the timeshare property will remain in at least as good condition during the term of the arrangement as it was at the time of closing, reasonable wear and tear excepted.[198] The proposed Act, in our view, should also provide that a developer warrants that a timeshare unit, and any other real property that owners have a right to use in conjunction therewith, are suitable for the ordinary uses of real estate of its type, and that the timeshare unit will be free from defective materials, and constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.[199] Moreover, the proposed Act should provide that a developer warrants that an existing use of the timeshare unit, continuation of which is contemplated by the parties, does not violate applicable law at the time of the transfer.[200]

We further recommend that the proposed Act should provide that any transfer of a timeshare interest gives to the purchaser all of the developer's implied warranties.[201]

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[196] See Reiter, "Annotation" (1980), 9 R.P.R. 122, at 125, where it is argued that "a builder can be liable in negligence to a direct or even to a subsequent home buyer for failure to comply with building code requirements, and the availability of this action in tort coupled with the breadth of building codes now in effect in Canada means that whether or not a warranty is to be implied, a purchaser will almost always have legal protection where a house is constructed defectively".

[197] See *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, (1979), 103 D.L.R. (3d) 385.

[198] See, for example, Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.15A (West).

[199] See, for example, Model Act, *supra*, note 18, §4-112(b), and Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.15B (West).

[200] See, for example, Model Act, *supra*, note 18, §4-112(c), and Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.15C (West).

[201] See, for example, Model Act, *supra*, note 18, §4-112(f), and Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.15F (West).

(iii) Additional Provisions

Finally, we make two recommendations applicable to both express and implied warranties. First, it is to be noted that, throughout this section dealing with express and implied warranties, we have referred to the obligations imposed upon developers as "warranties". In our Consumer Warranties Report, we noted the distinction made at common law between warranties and conditions, and indicated that the distinction was of great practical importance because of the different remedies available in the event of a breach.[202] We also noted that the distinction between warranties and conditions has been frequently criticized and we endorsed that criticism, adding that "the distinction focuses on an *a priori* classification of the obligation rather than on the severity of the breach of the obligation".[203] In the result, we recommended that the distinction between warranties and conditions should be abolished with respect to consumer sales and replaced by a single concept of "warranty".[204] In order to accomplish a similar result in the present context, we recommend that the proposed *Timeshare Act* should provide that, notwithstanding the use of the term "warranty", an injured party is not necessarily restricted to an action for damages.

Secondly, we have considered whether the parties should be permitted to contract out of the express or implied warranties provided for in the proposed *Timeshare Act*. We have concluded that, within the timeshare context, an absolute prohibition against the use of disclaimer clauses to exclude or restrict such warranties would be unduly restrictive. On the other hand, it is clear that an unrestrained ability to contract out of these provisions would create the potential for abuse. Accordingly, we have adopted a middle ground. We recommend that the proposed Act should expressly provide that no general disclaimer of express or implied warranties shall be effective, but a developer shall be permitted to disclaim liability in an instrument signed by a purchaser for a specified defect or a specified failure to comply with an express or implied warranty if the existence of the defect or failure entered into and became a part of the basis of the bargain.

(f) Land Transfer Tax

It will be recalled that, under the *Land Transfer Tax Act*,[205] a tax is levied upon the conveyance of, among other things, "recreational land", which would appear to include a freehold timeshare interest. Where recreational land is conveyed to a "non-resident person", the purchaser must pay a tax computed at the rate of twenty percent of the value of the consideration

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[202] *Supra*, note 178, at 31.

[203] *Ibid.*

[204] *Ibid.*

[205] *Land Transfer Tax Act*, R.S.O. 1980, c. 231. See *supra*, ch. 3, sec. 3(d).

for the conveyance, whereas a much lesser tax is imposed where the purchaser is not a non-resident person.[206]

As we indicated in chapter 3, the critical land transfer tax issue raised by the sale of a freehold timeshare interest concerns the fact that the tax is now imposed on the full value of the consideration paid for the interest, with no distinction being made between the value of the land and the value of the many recreational services that also form part of the purchase price.

It is true, of course, that the Act specifically includes within its purview various types of recreational land purchased by non-residents. To the extent, therefore, that one component of a freehold timeshare interest is land, we clearly accept the principle that the Act ought to apply. However, to the extent that the purchaser of such an interest acquires access to vacation amenities and services rather than to land—and it has even been suggested that "the interest in land is one of the least significant components"[207]—we are of the view that the imposition of a land transfer tax is inappropriate. It is certainly outside the spirit, and probably outside the letter, of the law insofar as freehold timeshare interests are concerned.

Two further points should be made here. First, it bears mentioning that not all timeshare arrangements attract land transfer tax. Obviously, contractual timeshares create no interest in land for the purchaser. While the fact that not all timeshare arrangements are treated alike is hardly surprising, and certainly justifiable, with respect to the real property component of a freehold timeshare interest, we do not believe that such treatment is equitable with respect to the service component of such an interest.

Secondly, it is noteworthy that Canada's tourism industry draws primarily from the American market. As a result, the potential sale of timeshare interests to American tourists could represent a significant boost to various facets of this industry. The imposition of a relatively high land transfer tax on the full value of the consideration paid for a freehold timeshare interest serves to discourage the flow of foreign vacationers to this Province and, therefore, the expansion of the tourism and timeshare industries.[208]

In its submission to the Commission, the Legal and Legislative Committee of the Resort Timesharing Council of Canada proposed that non-resident purchasers of freehold timeshare interests in Ontario should be excused from the payment of the twenty percent land transfer tax.[209] The Legal and Legislative Committee echoed the views expressed above con-

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[206] *Land Transfer Tax Act*, *supra*, note 205, s. 2(1) (as en. by S.O. 1985, c. 21, s. 2(1)) and s. 2(2).

[207] RTCC Submission, *supra*, note 19, at 4.

[208] A similar argument was made in the RTCC Submission, *ibid*.

[209] *Ibid*.

cerning the characterization of freehold timeshare interests and the desirability of facilitating the growth of the timeshare industry.

As a matter of policy, and having regard to the nature of freehold timeshare interests, the Commission does not endorse a blanket tax exemption for non-resident purchasers. Aside from creating a further inequity *vis-à-vis* domestic purchasers, who would continue to pay a tax, such a sweeping proposal does not recognize the fact that, however minimal the real property element of any given freehold timeshare interest may be, the purchaser is, in fact, acquiring an interest in land. We see no reason why a non-resident who acquires an interest in land as part of a timeshare arrangement ought to be treated any differently, for land transfer tax purposes, than any other non-resident purchaser of land. To do so would be to endorse a new and, in our view, unjustifiable, distinction.

Rather, the Commission recommends that non-resident purchasers of timeshare interests, a component part of which is land, should be required to pay land transfer tax not on the full value of the consideration paid, but, instead, on some lesser amount that represents only the actual value of the land acquired. This recommendation is, we believe, consistent with the basic philosophy of the *Land Transfer Tax Act*. Moreover, not only does it not create a new anomaly—by treating non-resident timeshare purchasers differently than other non-resident purchasers—but it also removes an existing inequity by treating all timeshare purchasers alike in respect of their acquisition of vacation and other services or non-proprietary interests.

(g) Property Tax Assessment

In our earlier discussion of the *Assessment Act*,[210] we noted that, in theory at least, Ontario land is to be assessed at its "market value" for property tax purposes.[211] "Market value" is defined as "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer".[212]

Insofar as freehold timeshare interests are concerned, it appears that the present practice is to add together the selling price of each interest to arrive at the gross selling price for the entire development.[213] To take into account the unique features of timeshare developments, in practice a number of deductions from the gross sales value of the complex are made in order to arrive at a net sales price, which is considered to be the "market value". First, twenty-five percent is deducted from the gross sales value as an

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[210] *Assessment Act*, R.S.O. 1980, c. 31. See *supra*, ch. 3, sec. 3(e).

[211] *Assessment Act*, *supra*, note 210, s. 18(1).

[212] *Ibid.*, s. 18(2).

[213] Interview with Ms. Elaine Cash, Evaluation Analyst, Special Properties Branch, Ontario Ministry of Revenue (March 11, 1988).

acknowledgment of the unusual character and untested performance of the timeshare concept, as well as of the high marketing costs involved. Secondly, deductions are made for non-real property items, such as chattels and exchange organization affiliation and membership fees. We understand that the Assessment Branch of the Ministry of Revenue relies on developers to provide the Branch with the relevant information.[214]

In the past, considerable controversy has been generated where freehold timeshare property is assessed on the basis of the gross sales value of the timeshare complex, rather than on the basis of the value of each unit taken singly. The problem is that, where this method of assessing timeshare complexes is used, there may be an inflated result to the assessment. While this inflated sales potential is the major attraction for developers in marketing their property as a timeshare project rather than as a traditional condominium, it is, arguably, largely irrelevant to the intrinsic market value of the property for property tax assessment. As the counsel for Deerhurst Resorts Ltd. argued before the Ontario Municipal Board,[215] the possibility of timeshare sales resulting in a developer's inflated profits is premised upon the marketing of an attractive holiday resort, and, as such, the increased value of the project, when assessed on the basis of cumulative timeshare sales, is arguably traceable to the sale of services and other amenities rather than to the value of the real property.

Various means of dealing expressly with the assessment problem are possible and have been tried outside Ontario. For example, a number of American jurisdictions with comprehensive timeshare legislation have enacted statutory provisions providing that, for assessment purposes, timeshare units are to be valued in the same manner as if they were owned by a single taxpayer. Accordingly, the property is assessed by reference to the assessment of condominiums or other properties of comparable size, type, and location, rather than to the cumulative price paid by timeshare owners. As an alternative, timeshare property could be assessed in a fashion similar to hotels, taking the income potential of the property into account. Or the property could be valued on a cost-of-replacement basis for the whole building and then divided proportionately among the timeshare owners.[216]

In our view, each of these assessment methods entails certain disadvantages. For example, there are practical problems involved in comparing timeshare properties with other properties for the purpose of tax assessment. It has been argued that, as a matter of principle, an assessment on this basis is not appropriate where market value assessment is statutorily mandated. Sales price is said to be the best indication of market value and, therefore, is preferable to an estimate of value based on subjective comparisons with

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[214] *Ibid.*

[215] *Regional Assessment Commissioner, Region 17 v. Deerhurst Resorts Ltd.* (1985), 17 O.M.B.R. 379.

[216] All of these various possibilities were canvassed and held to be partially applicable in the *Deerhurst* case, *ibid.*

other properties. Moreover, it may be difficult to decide which property type, if any, is similar to the timeshare development involved; indeed, a comparable property type may not be within the vicinity of the timeshare project, so that an assessment on the basis of a comparable property may not be possible.[217]

Finally, we wish to emphasize that, whatever statutory or jurisprudential foundation there may be for assessing timeshare property on the basis of the total resale value of all timeshare interests, the Assessment Branch has, in fact, made allowances for the unique features of timeshare interests by deducting a certain amount from the total resale value in order to arrive at what the Branch considers to be the development's "market value". At least for the present, therefore, the existence of this policy does militate against a more radical reform of the assessment system in the timeshare context.

In the same general vein, the Commission is acutely aware of the specialized nature of the issues and the broad scope of the considerations entailed in property tax assessment and reform. For the foregoing reasons, therefore, we do not wish to make any recommendation concerning the present method of assessing timeshare developments for property tax purposes. Accordingly, the assessment of such developments will continue to be decided in the ordinary course by the Assessment Branch of the Ministry of Revenue and the appeal tribunals (the Assessment Review Board and the Ontario Municipal Board) that have dealt with the issue to date. However, we do recommend that the question of timeshare property taxes should be considered as part of any wholesale review of the *Assessment Act*. It is clear that the many policy concerns pertaining to property taxes generally are highly relevant to any decision with respect to special properties such as timeshare developments and, accordingly, the timeshare assessment issue is more properly addressed in the larger context of the *Assessment Act*.

(h) Amendment of the Timeshare Instruments

While perhaps trite, it does bear emphasizing that the timeshare instruments, like a condominium declaration, a corporation's articles, or similar constitutional documents for other types of association, are not necessarily perceived to be timeless by those who are governed by their provisions. Accordingly, it is essential that the proposed *Timeshare Act* deal expressly with the amendment of the timeshare instruments.

In offering our recommendations for reform in this area, however, we do wish to stress one unique characteristic of timeshare developments, namely, the relatively large number of persons who own timeshare interests in each project. As a result, it is important to recognize that, as a practical matter, individual owners may not have a significant personal and direct input into the management of the affairs of the timeshare development, so

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[217] Interview with Ms. Elaine Cash, *supra*, note 213.

that their reliance on the timeshare instruments existing at the time they purchased their interest is likely to be substantial.

As in a number of other instances, the regime created by the *Condominium Act*[218] provides us with a useful—although, in this particular case, not entirely satisfactory—model for the timeshare context. With respect to the means by which a condominium declaration may be amended, reference should be made to section 3(4) of the *Condominium Act*. This section provides that "the declaration may be amended only with the consent of all owners and all persons having registered mortgages against the units and common interests".[219] In addition, section 3(8) of the Act provides that, under certain circumstances, the declaration may be amended by order of a judge of the District Court, upon the application of either the condominium corporation or a unit owner. Under this section, the judge may make such an order "if he is satisfied that an amendment is necessary or desirable to correct an error or inconsistency in the declaration or description or arising out of the carrying out of the intent and purpose of the declaration".

The Commission is of the view that legislation similar to the foregoing provisions in the *Condominium Act* ought to appear in the proposed *Timeshare Act*, but not as the exclusive means by which timeshare instruments may be amended. While, as a matter of policy, we see no reason not to endorse, in the timeshare context, an amending provision akin to section 3(4)—since this would be a legitimate exercise of democracy in that context, and unanimous consent appears to be entirely appropriate insofar as the amendment of the timeshare instruments is concerned—it seems clear that, as a practical matter, the requirement of unanimity among a substantial number of timeshare owners will effectively render that particular provision useless in a great many, if not virtually all, cases.

Given the impracticability of amending the timeshare instruments with the consent of all owners and registered mortgagees, we are of the view that the statutory burden must necessarily fall on judicial amendment. However, here too we believe that the *Condominium Act* provision is not adequate; a provision like section 3(8) would simply be too circumscribed in the timeshare context in light of the likely ineffectiveness of the only other method of amending the instruments, that is, on the consent of all owners and registered mortgagees. As a result, we have come to the conclusion that the powers of the judge to effect an amendment to the timeshare instruments ought to be expanded beyond those given to a judge under section 3(8) of the *Condominium Act*.

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[218] *Condominium Act*, *supra*, note 1.

[219] See, also, *ibid.*, s. 3(6):

> 3.—(6) When a declaration is amended, the corporation shall register a copy of the amendment executed by all the owners and all persons having registered mortgages against the units and common interests, and until the copy is registered the amendment is ineffective.

Accordingly, the Commission recommends as follows. First, the proposed *Timeshare Act* should provide that the timeshare instruments may be amended with the consent of all timeshare owners and all persons having registered mortgages against the timeshare interests and timeshare property. Where timeshare instruments are amended in this manner, the owners' association should be required to register a copy of the amendment executed by all the owners and all persons having registered mortgages against the timeshare interests and timeshare property. Until the copy is registered, the amendment should be ineffective.

Secondly, we recommend that the owners' association, on at least thirty days notice to every timeshare owner and registered mortgagee, or a timeshare owner, on at least thirty days notice to every other owner, the owners' association, and every registered mortgagee, should be entitled to apply to a judge of the District Court for an order amending the timeshare instruments. The judge should be empowered to make such an order if he is satisfied either that the proposed amendment is necessary or desirable to correct an error or inconsistency in the timeshare instruments or arising out of the carrying out of the intent and purpose of the timeshare instruments, or that the proposed amendment is for the benefit of the timeshare project as a whole.

While we are not of the opinion that every timeshare owner must endorse a proposed amendment—for such a requirement would effectively make this proposal another version of the consensual amendment proposal adopted earlier—we do believe that some statutory provision ought to be enacted for the protection of dissenters. Accordingly, we recommend that a judge should not be empowered to make an order amending the timeshare instruments where a majority of the timeshare owners are of the view that the proposed amendment is not for the benefit of the timeshare property as a whole.

Finally, the Commission recommends that an amendment to the timeshare instruments made by an order of a judge should not be effective until a certified copy of the order is registered.

(i) Mounting Timeshare Developments on Leaseholds

In this section, we consider whether the proposed *Timeshare Act* ought to permit a timeshare development to be mounted on a leasehold interest. In this type of development, the owner of the freehold would grant a long term ground lease to a developer, who, in turn, would be responsible for construction of the project and for subsequent sales to timeshare purchasers. At the end of the term of the ground lease, all the subsequently purchased interests would terminate and the property, including the improvements made thereon, would revert to the owner of the freehold.

Such projects could be structured in a number of different ways. For example, in the context of leasehold condominiums, there appear to be

three basic organizational forms. Upon completion of construction, any one of the following, or a variation thereof, might occur:[220] (1) the ground lease from the owner of the freehold to the developer might be cancelled, and separate leases of each unit substituted therefor;[221] (2) the ground lease might continue, but the developer could assign partial interests in the lease to the individual purchasers; or (3) again, the ground lease might continue, but the developer could grant subleases to the individual purchasers. The rights of the individual purchasers would depend, to some extent, upon the specific organizational structure adopted for the project.

Under the Ontario *Condominium Act*,[222] it is prohibited for a developer who owns a leasehold rather than a freehold interest in the underlying land to mount a condominium development on this leasehold interest.[223] Since leasehold condominiums are expressly prohibited in Ontario, it is clear that it would not be possible to have a condominium timeshare development mounted on an underlying leasehold. The question arises, therefore, whether the proposed timeshare legislation should follow the *Condominium Act* in this respect by prohibiting such leasehold development for all types of timeshare interest. At present, none of the Canadian provinces, and very few American states,[224] have specifically addressed the issue of the creation of timeshare projects mounted on a leasehold interest, with the consequence that such developments are generally permitted as a matter of legislative default. On the other hand, it would seem that the numerous problems associated with this type of structure have been perceived by the industry as representing an impediment to development. We understand that, to date, no Canadian timeshare project has been structured in this way.

In 1974, a Bill amending *The Condominium Act*[225] was introduced in the Ontario Legislature. The Bill included a provision permitting persons who held long term ground leases from the Crown to create leasehold condominiums.[226] A Task Force was then established to investigate and make recommendations concerning the advisability of implementing the proposed leasehold condominium provision. The Report of that Task Force in 1975 contains the most thorough available data on the perceived advan-

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[220] See Note, "The Leasehold Condominium" (1967), 2 Real Prop. Prob. & Tr. J. 349.

[221] In this case, the individual leases could run directly from the owner of the freehold to the purchasers of the units. Alternatively, they could run from the owner of the freehold to the developer, who, in turn, would assign the leases to the respective purchasers.

[222] *Supra*, note 1.

[223] *Ibid.*, s. 2(1).

[224] See, for example, Florida Real Estate Time-Sharing Act, Fla. Stat. Ann. §721.06(1)(k) and (l) (West), which expressly contemplates the possibility that a timeshare interest might be mounted on a leasehold.

[225] R.S.O. 1970, c. 77.

[226] Section 17 of Bill 118, 1974 (29th Leg. 4th Sess.) would have added s. 26 to *The Condominium Act*, *supra*, note 225, to provide for leasehold condominiums.

tages and disadvantages of such developments.[227] Ultimately, the Task Force concluded that, while the problems with leasehold condominiums were not conceptually insurmountable, they were far too numerous and detailed to make for a viable and adequately regulable form of housing. Among other things, the Task Force foresaw the following problems:[228]

> 6. The leasehold condominium concept has inherent in it a number of difficulties. The most serious of these difficulties relate to the financing and refinancing of the unit interests. Leasehold condominiums will likely be thought to be a high risk investment by financial institutions. Severe financing problems will occur as any rent recalculation date approaches and as the termination date of the leasehold interest approaches.
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> 7. Leasehold condominiums will also very likely encounter problems of dilapidation and disrepair toward the time when the leasehold interest terminates. While the common law doctrines with regard to waste and dilapidation should, in theory, cover this matter it is probably unwise to rely on these doctrines as a solution to the problem.
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> 8. Leasehold condominiums allow a wide latitude for landowners and developers to protect their rights in a manner abusive to the rights of the condominium unit owners. Any leasehold condominium scheme which is adopted in the province should be very precise and very complete in its terms so that the possibilities of abuse are minimized.
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> 9. From the point of view of both purchasers and financiers leasehold condominiums would probably be the least attractive element in the housing market. It is unlikely that leasehold condominiums could compete on an equal footing with freehold condominiums in the Ontario property market.
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> 21. The Task Force is of the opinion that the advantages to be gained from the introduction of leasehold condominiums into the province are relatively small. Since these advantages can only be secured through the establishment of an extremely complex regime, the success of which cannot be guaranteed, it is probably unwise to move forward with this idea until a need for this new type of tenure has been demonstrated.

While leasehold developments offer substantial advantages to the developer and landowner in terms of flexibility and profit, the problems for the purchasers of interests in leasehold developments far outweigh the rather minimal advantages of such a scheme for such purchasers. Where the development is structured such that the ground lease continues and the timeshare purchasers' interests are acquired by way of sublease, purchasers

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[227] Ontario Task Force on Leasehold Condominiums, *The Leasehold Condominium: Problems and Prospects* (1975) (hereinafter referred to as "Task Force Report").

[228] Task Force Report, *ibid.*, at 2-3 and 5-6.

would have to be protected against the potential insolvency of both the freeholder and the leaseholding developer, and therefore special provisions would have to be made to insulate the purchasers' interests from the claims of yet another layer of creditors against the property. Similarly, the purchasers would have to be protected as against the claims of the owner of the freehold should the developer default on rental payments owing under the ground lease. Moreover, if a developer went bankrupt, the federal *Bankruptcy Act* might well permit a trustee in bankruptcy to terminate the ground lease as a way of reducing the debtor's liabilities.[229] In addition, the various problems raised by the Task Force with respect to maintenance and deterioration of the property as the developer's leasehold interest enters its final years are equally cogent in the timeshare context, since the reversion of the property subsequent to the expiry of the timeshare arrangement will be to the freeholder who, of course, has nothing to do with the timeshare operation while it is still ongoing.

In light of the significant problems associated with the notion of timeshare projects being mounted on leasehold interests, and the marginal advantages offered by such schemes, it is recommended that the proposed timeshare legislation expressly prohibit such developments. It would require a statutory scheme of significant complexity in order to address the problems that such projects would inevitably create, and it would seem that the rewards for such efforts would not be justified. Furthermore, it would seem desirable for the timeshare legislation to remain generally parallel to the Province's condominium legislation. It makes little sense for the policy decision behind the *Condominium Act*'s prohibition of leasehold condominiums to be accompanied by a contrary policy decision with respect tc leasehold timeshare interests.

(j) *Residential Complex Sales Representation Act, 1983*

As we indicated in an earlier section,[230] the purpose of the *Residential Complex Sales Representation Act, 1983*[231] (RCSRA) is to prohibit the sale of interests in residential buildings (particularly those in which tenants currently reside) to persons who, as a result of a misrepresentation, are led to believe that they are purchasing a specific unit in such a building, with the automatic right to occupy that unit. The focus of the legislation is on the disclosure given to the purchaser by the vendor or the vendor's agent of the interest to be acquired by the purchaser. Consequently, the Act provides that "[a] person is not in contravention of subsection (1) simply because he sets out a clear, accurate, written statement of law in respect of the right to occupy the unit".[232]

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[229] *Bankruptcy Act*, R.S.C. 1970, c. B-3, s. 14(1)(k). See, also, *Re Palais des Sports de Montreal Ltée* (1960), 1 C.B.R. (N.S.) 260 (Que. Q.B.).

[230] *Supra*, ch. 3, sec. 3(a).

[231] S.O. 1983, c. 67.

[232] *Ibid.*, s. 2(5).

It is interesting to note that the Act is said not to apply to a sale, offer to sell or advertisement for sale of a unit or proposed unit as defined in the *Condominium Act*[233] or a security issued by a corporation to which the *Co-operative Corporations Act*[234] applies. These Acts provide for the disclosure of information to persons who intend to purchase condominium units or securities, respectively. Presumably it was thought that the disclosure provisions in the *Condominium Act* and the *Co-operative Corporations Act* ought to prevail over the far less detailed provisions in the RCSRA.

At present, the applicability of the RCSRA to timesharing has yet to be determined by Ontario courts. However, an important facet of the timesharing regime recommended by the Commission in this Report is the provision for full and accurate information to be given to prospective timeshare purchasers. Our proposals, if implemented, would result in detailed, comprehensive disclosure legislation encompassing, but also going far beyond, the stated policy underlying the RCSRA. Accordingly, it is recommended that, with the enactment of a new timeshare statute, the *Residential Complex Sales Representation Act, 1983* should be amended to exclude specifically from its ambit all interests to which the proposed *Timeshare Act* applies.

(k) Regulation of Condominium Timeshare Developments

In the case of timeshare developments that are structured as condominiums, it would seem advisable to stipulate in the proposed *Timeshare Act* that the provisions of the *Condominium Act*[235] shall continue to apply. Although the new legislation will designate timeshare interests as registrable interests under the Province's land registration schemes,[236] the *Condominium Act* contains a number of provisions that are central to the creation and sale of property rights of a condominium nature. Thus, the developer of condominium timeshare interests will have to register a declaration and description under that statute, as well as a notice of timeshare plan[237] and materials required on an application for registration under the *Timeshare Act*.

Although the double regulation involved in the development and sale of condominium timeshares may impose an extra cost burden on developers (which, in turn, may well be passed on to purchasers), in most instances the impact will be relatively small. By and large, the recommendations for a *Timeshare Act* in the present Report have been designed to track many of the existing provisions of the *Condominium Act*. Thus, while the concurrent

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[233] *Supra*, note 1. See RCSRA, *supra*, note 231, s. 3(b).

[234] R.S.O. 1980, c. 91. See RCSRA, *supra*, note 231, s. 3(c).

[235] *Supra*, note 1.

[236] See *supra*, this ch., sec. 7(c)(ii)a.

[237] See *supra*, this ch., sec. 7(c)(ii)b.

applicability of the two statutes will entail some duplicate filing and registration, as discussed above, most of the details with respect to consumer protection and management are such that compliance with one statutory scheme would encompass compliance with the other.

Needless to say, however, there will be some discrepancies between the two pieces of legislation, and, indeed, there may even be instances in which the two statutes impose conflicting (in the sense of competing, if not contradictory) requirements on developers. In such an eventuality, it would seem logical that the specific timeshare legislation, rather than the more general condominium legislation, should be paramount. Where a timeshare condominium is involved, it seems clear that the developer is really marketing timeshare interests rather than condominiums *per se*; accordingly, the policy decisions that have been taken in this Report with respect to the peculiarities of timeshare developments would be the preferable ones to be implemented. It is therefore recommended that the proposed *Timeshare Act* should provide that both the *Condominium Act* and the *Timeshare Act* shall apply to the sale of condominium timeshares, but that the *Timeshare Act* shall govern in the event of a conflict.

(l) Compliance by Existing Projects

With the enactment of comprehensive timeshare legislation, there arises a need to address the problem of the extent to which those timeshare developments already existing in Ontario must accommodate themselves to the new regulatory environment. As is evident, one would not want to penalize these developments by requiring overnight compliance with the proposed *Timeshare Act* (with its various threats of private remedies and public sanctions). At the same time, one would not want to exempt pre-existing projects from the regulatory provisions that the Legislature believes ought to govern timeshares simply because of their early date of construction.

As a first step, we are of the view that the proposed *Timeshare Act* should contain a provision creating a specific compliance period for pre-existing developments. Accordingly, it is recommended that, subject to any waiver of compliance by the Registrar, as proposed below, any timeshare project in existence (that is, in respect of which sales have actually commenced) prior to the date that the new Act comes into force should be required to comply with all the provisions of the Act within six months of that date. In this way, developers will have ample opportunity, for example, to produce the various disclosure documentation required for further sales of timeshare interests in these pre-existing projects, and to organize the management of pre-existing projects in the way contemplated by the Act.

While the Act will provide that all of its requirements apply to pre-existing timeshare developments after a six month compliance period, we recommend that there should be an additional provision for a discretionary power in the Registrar to waive the need for compliance with one or more of

the Act's terms in appropriate cases. It should be emphasized that the Registrar's power of waiver would entail a relatively narrow ambit of discretion. Discretionary waivers would be made on a case-by-case basis by the Registrar, with a view to saving the developer some of the costs entailed in compliance with a portion of the Act in circumstances where the benefit of protection at which those provisions aim is minimal or non-existent.

One major area in which this case-by-case assessment might come into play is in connection with the disclosure provisions of the Act where the timeshare interests have already been sold. Once again, it makes little sense for the developer to be forced to prepare disclosure documentation for the benefit of purchasers where the sales have already closed and the purchasers are in possession. On the other hand, of course, the Registrar would not be advised to exercise this discretionary power to waive disclosure requirements in circumstances where interests in the pre-existing development are still being marketed. Similarly, the provisions designed to provide purchaser protection either prior to closing or subsequent to closing should not be the subject of a waiver where the conditions that those provisions are aimed at alleviating are still in existence.

The point to be made, then, is that the Registrar's power is not to be used in order to decrease the burden of compliance where the beneficiaries of the Act's terms will in any way suffer. Rather, the Registrar's discretion should be exercised only after the Registrar is satisfied that compliance in the particular case would be all but meaningless to the beneficiaries of the statutory provision from which the developer is being exempted, and we so recommend.

10. REMEDIES

It is trite to say that a legislative right is only as effective as the remedies prescribed to ensure its enforcement. Accordingly, the proposed timeshare statute must contain remedial provisions that are adequate to the regulatory task embodied in its substantive provisions. Ideally, a tailor-made remedial scheme would include a mix of civil, administrative, and penal sanctions. As one commentator has indicated, such a mixture of private and public remedies is "a reflection of the realization that the most effective response to marketplace abuse is three-pronged: consumer-initiated civil actions, administrative enforcement by government and, as a last resort, the criminal sanction".[238]

(a) Civil Remedies

The possibility of a civil cause of action for a victimized party has been said to provide "both a convenient and psychologically satisfying vehicle of redress for the motivated consumer and a cost-saving opportunity for the

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[238] Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1973), 15 Osgoode Hall L.J. 327, at 356.

invariably under-staffed and poorly funded governmental enforcing authority".[239] Given the state of the law in Canada, any such civil remedy would have to be conferred directly upon a consumer by the proposed timeshare statute, since recent judicial pronouncements on the question of a common law cause of action for breach of statute have been rather restrictive. Thus, for example, in *The Queen v. Saskatchewan Wheat Pool*,[240] the Supreme Court of Canada's decision—that, if a statutory breach is to constitute a compensable wrong, it must be subsumed under the law of negligence—tends to put before plaintiffs a frequently insurmountable hurdle. While a breach of statute can at times be conveniently pointed to as constituting evidence of negligence, it is extremely difficult for a plaintiff to show the requisite common law duty of care where the breach of duty alleged arises only by virtue of the statute.

In the timeshare context, a purchaser may well have a cause of action in misrepresentation should the developer engage in one of the prohibited types of misstatement specified in the Act. By contrast, however, it would seem difficult for a purchaser to bring an action based upon a developer's failure to provide the required disclosure statement, since no such duty to provide a disclosure statement exists outside the statute. In view of the current judicial position, it is little wonder that some Canadian consumer protection statutes have been criticized as failing to "provide a full, balanced, and flexible range of remedies [which failure] has the effect of emasculating" the statutory standards.[241] With the severe limitation of any common law right of action, it would appear that the only way to make sense of the wide range of substantive provisions included in the proposed timeshare statute would be to incorporate by legislation an equally wide range of civil remedies. In this way, the duties that are newly created under the Act would be specifically said to flow from developer to purchaser (and, perhaps, from other statutory wrongdoers to identifiable plaintiffs).

Once it is decided that a civil cause of action should be built into the statute, the question arises as to the specific instances in which there should be a remedy. The American timeshare legislation tends to point in two directions, taking either a restrictively defined approach, in which only specific statutory breaches are identified as actionable,[242] or a very open-ended approach, in which it is stated that if a developer or any other person subject to the legislation fails to comply with any provision of the Act, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief.[243]

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[239] *Ibid.*

[240] [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9.

[241] O'Grady, "Consumer Remedies" (1982), 60 Can. B. Rev. 549, at 562.

[242] See, for example, Louisiana Timesharing Act, La. Rev. Stat. Ann. §9:1131.10E (West).

[243] See, for example, Virginia Real Estate Time-Share Act, Va. Code §55-382.

With respect to the first, narrower, option, the timeshare statute could follow the example of the *Condominium Act* and simply allow purchasers to initiate an action where they have relied on false, deceptive, or misleading statements in the disclosure documentation.[244] Other specific remedies could then be set out to accompany this, which might include the right to rescind the agreement where the developer has sold the timeshare interest prior to registration of the project, or where he has failed to provide the purchaser with a disclosure statement. However, it is evident that this approach might leave the purchaser with a number of essentially unenforceable statutory rights where a specific statutory remedy in respect of such rights has been inadvertently omitted. Thus, while it would be a statutory requirement for the developer to provide the purchaser with all relevant information concerning her rights of timeshare exchange or to conform to the strictures regarding the promotional activities and other market practices of sales personnel, there might be no actionable statutory duty flowing from the developer to the purchaser.

The Commission has concluded and, accordingly, recommends that the proposed Ontario timeshare legislation should include a broad provision that entitles a timeshare purchaser or a timeshare owners' association to bring an action against the developer or any other person subject to the Act who has failed to comply with any provision of the Act or the regulations or of the timeshare instruments. Furthermore, it is recommended that the proposed legislation should expressly provide that the purchaser or the owners' association is entitled to bring an action for damages or injunctive or declaratory relief. Finally, in view of the restrictive approach taken by the Supreme Court of Canada in *Board of Governors of the Seneca College of Applied Arts and Technology v. Bhadauria*,[245] it is recommended that the proposed timeshare statute should provide expressly that the civil remedies set out in the Act do not preclude any person from pursuing any other statutory or common law remedies or causes of action that may be at his disposal.

It is clear that, in many cases, a statutory breach will affect a large number of timeshare purchasers, whose individual loss will not, however, be of sufficient magnitude to warrant the initiation of separate actions. Under the general law, a class action may be brought pursuant to Rule 12 of the Rules of Civil Procedure,[246] but may be struck out where the damages to be paid to each class member require individual assessment[247] or, it appears,

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[244] *Condominium Act*, *supra*, note 1, s. 52(5).

[245] [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 (no private cause of action where statutory remedial scheme is comprehensive).

[246] O. Reg. 560/84.

[247] *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, 32 C.P.C., rev'ing (1979), 21 O.R. (2d) 780, 6 B.L.R. 94 (C.A.), aff'ing (1977), 17 O.R. (2d) 193, 2 B.L.R. 201 (H.C.J.). See Ontario Law Reform Commission, *Report on Class Actions* (1982), esp. at 24-33.

where the claims of the class members are based upon separate contracts.[248] However, pursuant to section 14(1) of the *Condominium Act*, the condominium "corporation after giving written notice to all owners and mortgagees may, on its own behalf and on behalf of any owner, sue for and recover damages and costs in respect of any damage to common elements, the assets of the corporation or individual units"; under section 14(2), the corporation may commence such a class action "notwithstanding that the corporation was not a party to the contract in respect of which the action is brought".

The Commission is of the view that a class action by a representative plaintiff on behalf of all similarly injured timeshare purchasers would be a highly useful procedural mechanism. We would, though, go further than the *Condominium Act*, which permits only the condominium corporation to act as a representative of the class, and which contemplates a class action only in respect of property damage.

Accordingly, it is recommended that a timeshare purchaser and the timeshare owners' association should both be expressly authorized to bring a class action on behalf of other timeshare purchasers for damage to the property of the timeshare development, to the assets of the owners' association, or to the individual units, as well as for personal injury to the owners, in accordance with the comprehensive class action procedure recommended by this Commission in its *Report on Class Actions*.[249] However, until such a scheme has been implemented by the Legislature, the proposed *Timeshare Act* should provide that a timeshare purchaser or the owners' association may initiate a class action, as described above, whether or not the claims of the timeshare purchasers are based upon separate contracts and whether or not the damages to be paid to each class member require individual assessment. Since each timeshare owner will, of course, have her own contractual arrangement with the developer, and may have a different size of interest (and, as a consequence, a different loss), depending upon the physical unit, length of stay, and season, there is no point in authorizing a class action mechanism without specifying that there is no need for a technically unified cause of action or uniform calculation of damages.

The statute should also require that the representative plaintiff should give written notice to the other timeshare owners of the intention to initiate a class action. Finally, the proposed *Timeshare Act* should provide that the costs in any such action shall be borne by the timeshare purchasers involved in the action in the proportion in which their interests are affected.

(b) Administrative Remedies

In chapter 3, we saw that provincial consumer protection statutes rely extensively on a range of administrative measures to ensure conformity with

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[248] See *ibid.*, at 22-24.

[249] *Supra*, note 247.

the legislation. For example,[250] in the *Business Practices Act*,[251] administrative enforcement supplements the private remedies created by the statute; in the *Real Estate and Business Brokers Act*,[252] it stands alone as the sole statutory means of encouraging compliance.

It is our conviction that the civil remedies that we proposed in the preceding section should be buttressed by conferring appropriate enforcement powers on the officials responsible for the administration of the proposed *Timeshare Act*, that is, the Minister of Consumer and Commercial Relations, the Director of the Business Practices Division of the Ministry of Consumer and Commercial Relations, and the Registrar, dealing with timesharing, within the Business Practices Division.[253]

Our reason for favouring the supplementing of private remedies with an array of administrative measures can be simply stated: as one commentator has indicated, "[w]hile private action may be economically worthwhile and psychologically justifiable, comprehensive consumer trade practices regulation cannot rely solely upon consumer policing of the marketplace".[254] If enforcement were confined to remedies available through private litigation, undue regulatory dependence would be placed upon the various fortuitous factors influencing individual choice, resulting in "at best a 'random and fragmentary enforcement,' if there were any at all".[255]

Before we turn to our recommendations, we wish to state an important *caveat* to our support for the grant of administrative remedies in the proposed timeshare legislation, namely, that these remedies must satisfy the *Canadian Charter of Rights and Freedoms*[256] and, in particular, section 8 thereof. Section 8 provides that "[e]veryone has the right to be secure against unreasonable search or seizure". We understand that many of the investigative powers found in Ontario statutes are under study by the Ontario government to ensure that they conform to the Charter. Our proposals must be read as being subject to the outcome of any such study, and, of course, to any jurisprudence bearing on this question. To the extent that these powers contravene the Charter and require amendment, or even deletion, they might well have to be altered in the timeshare context as well.

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[250] See, also, for example, *Motor Vehicle Dealers Act*, R.S.O. 1980, c. 299; *Mortgage Brokers Act*, R.S.O. 1980, c. 295; *Paperback and Periodical Distributors Act*, R.S.O. 1980, c. 366; and *Travel Industry Act*, *supra*, note 73.

[251] *Supra*, note 60.

[252] *Supra*, note 15.

[253] See *supra*, this ch., sec. 3.

[254] Belobaba, *supra*, note 238, at 365.

[255] *Ibid.*, at 365-66.

[256] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

Turning now to our proposals for reform, it is evident that, despite some variations, there is a deliberate, uniform approach to the conferral of administrative powers on the public officials responsible for the administration of the various consumer protection statutes in this Province. The Commission has come to the conclusion that, as a general principle, the proposed *Timeshare Act* should follow the model of these statutes insofar as the imposition of statutory administrative remedies are concerned, and we so recommend. In the following paragraphs we shall, therefore, offer only general proposals for reform, some of which, it should be emphasized, have been altered from the consumer protection statutes in light of the unique characteristics of timesharing. We shall not attempt to delineate every detail relating to the proposed administrative remedies. With respect to such details, the Commission recommends that the Ministry of Consumer and Commercial Relations—which will administer the proposed *Timeshare Act* —should be responsible for establishing in that Act a comprehensive statutory scheme governing administrative remedies similar to that in force under existing consumer protection legislation.

We turn first to the broad powers to be conferred on the Registrar under the *Timeshare Act*. The Commission recommends that, where the Registrar receives a complaint in respect of a developer, sales personnel, or an exchange program operator, he should be empowered to request information respecting the matter complained of, and the person in receipt of such a request should be required to furnish the information.[257] For the purpose of investigating a complaint, the Registrar or any person designated in writing by him should be entitled at any reasonable time to enter upon the business premises of the developer, sales personnel, or exchange program operator in order to make an inspection in relation to the complaint.[258] In addition to these powers, we recommend that the proposed Act should confer a power on the Registrar or his designate to enter and inspect the business premises of a developer, sales personnel, or exchange program operator in order to ensure compliance with the Act and the regulations.[259] Whenever an inspection is undertaken, the person inspecting should be empowered to examine all relevant documents and to remove them for the purpose of copying.[260]

The Commission further recommends that the proposed legislation should give the Registrar the power to order that the developer permanently or temporarily cease marketing, selling, or otherwise dealing with any interest or interests he may have in the timeshare development where the

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[257] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 11(1), and *Motor Vehicle Dealers Act*, *supra*, note 250, s. 9(1).

[258] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 11(3), and *Motor Vehicle Dealers Act*, *supra*, note 250, s. 9(3).

[259] See, for example, *Travel Industry Act*, *supra*, note 73, s. 17(1), and *Paperback and Periodical Distributors Act*, *supra*, note 250, s. 10(1).

[260] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 13, and *Motor Vehicle Dealers Act*, *supra*, note 250, s. 11.

developer has breached any provision of the Act or regulations.[261] Where the Registrar proposes to make such an order, he should be required to serve notice of his intention, supported by written reasons, on the developer, who should be entitled to a hearing before the Commercial Registration Appeal Tribunal.[262]

With respect to the powers to be conferred on the Director of the Business Practices Division, we recommend, first, that where the Director believes on reasonable and probable grounds that a developer, sales personnel, or exchange program operator has contravened any of the provisions of the Act or the regulations, the Director should be empowered to order an investigation to determine whether such a contravention has occurred.[263] The Director should be required to send a full and complete Report to the Minister of Consumer and Commercial Relations where the report of the investigation makes it appear to the Director that there has been a contravention of the Act or the regulations.[264]

Secondly, the Director should be empowered to give a "direction" that the developer refrain from dealing with timeshare assets, or that a person holding purchasers' trust funds refrain from dealing with or releasing such funds, where the developer is the subject of an investigation ordered by the Director or if proceedings in relation to a contravention of the Act or regulations are about to be, or have been, instituted against the developer. Such a "direction" should not be given where the developer files with the Director a bond, in whatever form, terms, and amount as the latter determines.[265]

The Commission recommends that an application to the court concerning the disposition of assets or trust funds should be permitted in three cases: (1) by a person who receives a "direction" given by the Director, if that person is in doubt as to the application of the "direction" to any assets or trust funds; (2) by any other person who is making a claim to the assets or trust funds;[266] and (3) by the Director.

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[261] In an earlier section, the Commission recommended that the Registrar should be empowered to order the immediate cessation of the use of any false or misleading advertising materials, subject to a right of appeal to the Commercial Registration Appeal Tribunal. See *supra*, this ch., sec. 6(b).

[262] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 9, and *Travel Industry Act*, *supra*, note 73, s. 6.

[263] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 15, and *Motor Vehicle Dealers Act*, *supra*, note 250, s. 13.

[264] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 17, and *Motor Vehicle Dealers Act*, *supra*, note 250, s. 15.

[265] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 18, and *Travel Industry Act*, *supra*, note 73, s. 22.

[266] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 18(3), and *Travel Industry Act*, *supra*, note 73, s. 22(3).

Thirdly, it is recommended that, where it appears to the Director that a developer, sales personnel, or exchange program operator has not complied with any provision of the proposed Act or the regulations, the Director should be entitled to apply to the court for an order directing that person to comply with such provision, and upon the application the court may make such order as the court thinks fit.[267] This right to apply to the court should arise notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights the Director may have.

Finally, with respect to the administrative powers of the Minister of Consumer and Commercial Relations, we recommend that he be given the power to appoint a person to make an investigation into any matter to which the proposed Act applies.[268]

(c) Penal Sanctions

The various consumer protection statutes administered by the Ministry of Consumer and Commercial Relations rely on the availability of penal sanctions as a further inducement to compliance with the Act and co-operation with the officials responsible for its administration. As suggested in the following passage, such sanctions may be regarded as beneficial if relied upon as the "remedy of last resort":[269]

> Both the appropriateness and the effectiveness of the criminal sanction in the enforcement of consumer trade practices legislation have been questioned. Nonetheless a consensus has emerged that while the criminal sanction ought not to be the primary enforcement tool, it has not outlived its usefulness as a remedy of last resort. Most commentators have argued in favour of retaining the criminal prosecution alternative to deal selectively with the more abusive cases of deceptive or unconscionable trade practices where effective deterrence is a desirable and attainable end.

We recommend that, subject to one *caveat*, the proposed *Timeshare Act* should contain penal provisions modelled on section 50 of the *Real Estate and Business Brokers Act*. Section 50 provides as follows:

> 50.—(1) Every person who, knowingly,
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> (a) furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
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> (b) fails to comply with any order, direction or other requirement made under this Act; or

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[267] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 49, and *Travel Industry Act*, *supra*, note 73, s. 24.

[268] See, for example, *Real Estate and Business Brokers Act*, *supra*, note 15, s. 14, and *Travel Industry Act*, *supra*, note 73, s. 19.

[269] Belobaba, *supra*, note 238, at 372.

(c) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than $2,000 or to imprisonment for a term of not more than one year, or to both.

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is $25,000 and not as provided therein.

(3) No proceedings under this section shall be instituted except with the consent of the Minister.

(4) No proceeding under clause (1)(a) shall be commenced more than one year after the facts upon which the proceeding is based first came to the knowledge of the Director.

(5) No proceeding under clause (1)(b) or (c) shall be commenced more than two years after the time when the subject-matter of the proceeding arose.

With respect to whether the consent of the Minister of Consumer and Commercial Relations should be a prerequisite to bringing proceedings under the offence section, as under section 50(3) of the *Real Estate and Business Brokers Act*, we observe that two approaches to this question have been taken in the consumer protection statutes. Although ministerial consent is a prerequisite as well under the *Mortgage Brokers Act*,[270] the *Motor Vehicle Dealers Act*,[271] and the *Paperback and Periodical Distributors Act*,[272] it is not required under the *Consumer Protection Act*,[273] *Business Practices Act*,[274] or the *Travel Industry Act*.[275] In light of the expertise and experience of the Ministry of Consumer and Commercial Relations in dealing with the issue of ministerial consent, we recommend that the matter be left to the Ministry to decide the approach that should be taken.

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[270] *Supra*, note 250, s. 31(3).

[271] *Supra*, note 250, s. 22(3).

[272] *Supra*, note 250, s. 15(3).

[273] *Supra*, note 7, s. 39.

[274] *Supra*, note 60, s. 17.

[275] *Supra*, note 73, s. 25.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

COMPREHENSIVE STATUTORY REFORM

1. The Legislature should enact a new statute, to be known as the *Timeshare Act*, that will deal comprehensively and systematically with all aspects of timesharing; regulation of timesharing in Ontario should not be by way of amendment to the *Condominium Act*, the *Securities Act*, or any other legislation that currently touches on the development, sale, and ownership of timeshared property.

2. The proposed *Timeshare Act* should contain enabling provisions that recognize the validity and facilitate the conveyancing of timeshare interests.

3. The proposed timeshare statute should contain regulatory provisions governing the sale, ownership, management and termination of timeshared property, but the regulatory provisions should be, for the most part, of a disclosure nature, and should not permit a review of the merits of a timeshare development by a government agency.

JURISDICTION

4. Subject to Recommendation 64, *infra*, dealing with management of foreign timeshare projects, and to Recommendation 5, *infra*, the proposed *Timeshare Act* should apply to both domestic projects and foreign projects that are marketed within Ontario.

5. The Registrar (see *infra*, Recommendation 10) should have the power to exempt foreign timeshare developments from compliance with requirements that, in his opinion, are of a purely local nature.

6. The forms of timeshare interest to be covered by the proposed timeshare legislation should be defined expansively to include all fee and non-fee structures. The proposed statute should apply to all structures situated on real property and designed for residential occupancy on a timeshared basis.

7. The proposed *Timeshare Act* should apply to recreational vehicle campgrounds, except for the proposed management provisions of the Act and other clearly inappropriate provisions.

8. Timeshared interests in personal property should be excluded from the proposed legislation.

9. Timeshare arrangements that consist of fewer than ten timeshares or that run for a period of less than five years should be excluded from the proposed timeshare legislation.

REGULATION BY A NEWLY CREATED REGULATORY AGENCY

10. An agency should be created within the Business Practices Division of the Ministry of Consumer and Commercial Relations for the purpose of regulating timesharing under the proposed timeshare legislation. The offices of Registrar and Assistant Registrar should be created, to operate under the supervision of the Director of the Business Practices Division, and any decision of the Registrar should be appealable to the Commercial Registration Appeal Tribunal.

11. Timeshare developments covered by the proposed legislation should be required, prior to being marketed within the Province, to register with the Registrar.

12. The Registrar should be empowered to receive and process all applications for registration.

13. In order to register a timeshare project, timeshare developers should be required to submit the following information concerning the project to the Registrar: a copy of the proposed disclosure statement (see *infra*, Recommendation 23); a brief description of the property and its amenities; the proposed financial arrangements for the project; the timeshare instruments; the contract of purchase and sale; the management agreement; satisfactory evidence of the method to be used to ensure purchaser protection (see *infra*, Recommendations 47 *et seq.*); and such other information as may be prescribed by regulation.

14. Developers of foreign timeshare projects marketed in Ontario should be required to provide the Registrar with a statement from the administrative agency responsible for regulating timeshare projects in the jurisdiction of the *situs* of the project that the timeshare registration requirements, and the requirements governing management of the project, of that jurisdiction have been complied with, and to designate an Ontario lawyer to act as their agent for service of any legal process.

15. Upon receipt of an application for registration, the Registrar should issue an acknowledgement of receipt to the developer.

16. Within a specified number of days after receiving the application, the Registrar should determine whether the application should be approved or rejected.

17. If the Registrar fails to act within the specified time period and the applicant has not consented to the delay, the timeshare project ought then to be deemed to be registered.

18. In considering whether the application has satisfied the statutory requirements, the Registrar should be empowered to inspect the premises at the applicant's expense.

19. Where the Registrar determines that any of the requirements contained in the legislation have not been met, he should be required to notify the applicant of the deficiencies and advise her that she has a specified number of days in which to make the corrections and refile her application.

20. If the deficiencies in the application are not corrected within the specified period, the Registrar should serve notice of rejection of the registration, together with written reasons for such rejection, on the applicant.

21. The notice of rejection of application should inform the applicant that she is entitled to a hearing before the Commercial Registration Appeal Tribunal, provided that, within a specified number of days, she so advises the Registrar and the Tribunal in writing.

22. An applicant should be required to amend or supplement her application for registration to reflect any material change in the information required under the proposed statute.

DISCLOSURE AND RIGHTS OF RESCISSION

23. The *Timeshare Act* should require that purchasers be given a disclosure statement that contains the following information: the name and address of the developer; the form of timeshare interest being offered (that is, whether it is of a fee or right-to-use nature); a brief description of the project; a general description of the units (including the form and number of units that are to be sold on a timeshare basis); the proposed schedule for completion of the timeshare development; the current or projected budget (including the projected common expense liability to be borne by the purchaser) and a statement of any services not reflected in the budget that the developer provides; the total financial obligation of the purchaser (including purchase price, maintenance fees, recreation fees and real property taxes, as well as information concerning any financing offered by the developer); a description of any liens, defects, or encumbrances on or affecting the title, or any pending action material to the timeshare project; a description of the insurance provided for the benefit of the timeshare owners; the name and address of the trustee; a schedule for refunding any funds to the purchaser if the timeshare project is not completed or if the purchaser exercises her right of rescission; managerial arrangements for the timeshare project and a description or copy of the management agreement; a statement as to whether the development is a participant in any timeshare exchange program, together with a copy of the timeshare exchange information statement; a statement as to title to personal property located in the

units or the common areas and available for use by purchasers, and how purchasers will be assured the use of personal property during the term of the timeshare arrangement; and such additional information as is required by regulation.

24. Disclosure statements should be delivered to purchasers before they execute an agreement of purchase and sale.

25. The proposed legislation should require that, before an agreement of purchase and sale is executed, purchasers acknowledge in writing receipt of the disclosure statement and that they have been informed of their rights of rescission (see *infra*, Recommendation 27).

26. The developer should be required to retain such acknowledgments for a period of three years from the date of receipt of the acknowledgment.

27. The proposed *Timeshare Act* should provide all purchasers of timeshare interests governed by the Act with a right of rescission, to be exercised by delivery to the vendor or developer (or in the case of a foreign development, the Ontario solicitor designated as agent) of a notice of rescission within ten calendar days of receipt by the purchaser of the disclosure statement.

28. Within fifteen days of receiving a written notice of rescission, the developer should be required to return all payments made by the purchaser, without interest or deductions.

TIMESHARE EXCHANGE

29. (1) Developers should be required to provide timeshare purchasers with certain specific information concerning any exchange opportunities that are being offered in conjunction with the sale of a timeshare interest.

(2) This timeshare exchange information statement should include: the name and address of the exchange company; any conditions attached to the purchaser's participation in the exchange program (such as continued affiliation of the timeshare project with the exchange program); an explanation of the optional or mandatory nature of the purchaser's participation in the exchange program; a description of the terms of the purchaser's contractual relationship with the exchange company and of the operation of the exchange program; a description of the procedure to qualify for and effectuate exchanges; the relevant participatory fees; the number of units that qualify for participation in the exchange program; the number of owners eligible to participate in the exchange program; the percentage of confirmed exchanges within the past year; where (1) the exchange company and the developer are related or do not deal

at arm's length, or (2) either the exchange company or the developer, or any of its officers or directors, has any legal or beneficial interest in the other, or (3) an officer or director of either the exchange company or the developer is related to, or does not deal at arm's length with, an officer or director of the other, information concerning the nature and extent of their relationship; and where an officer or director of either the exchange company or the developer is an officer or director of the other, information concerning that fact. The terms "related" and "arm's length" should be defined expansively, in much the same way as, for example, "related persons" is defined in the *Bankruptcy Act* and the *Income Tax Act*.

30. Exchange companies should be required to file with the Registrar a statement containing the information specified in Recommendation 29(2), *supra*, prior to offering an exchange program to any purchaser in the Province and, thereafter, on an annual basis.

31. The Act should require that, within a specified number of days of receipt of the requisite exchange information, the Registrar should be required to notify the exchange company in writing whether the application is complete. If no such notification is forthcoming, the filing should be deemed to be approved.

32. If the Registrar determines that the required filing is incomplete, he should so advise the applicant and permit her a specified time in which to correct any identified deficiencies. Where the deficiencies are not corrected, the Registrar should be empowered to serve a notice of rejection of the registration.

33. The notice of rejection should contain written reasons for the rejection, and should advise the applicant that she is entitled to a hearing by the Commercial Registration Appeal Tribunal.

34. The required timeshare exchange information should be either included by the developer in the developer's disclosure statement or appended thereto.

35. Purchasers should be required to acknowledge in writing that they have received the prescribed information and have been informed of their rights of rescission.

36. The developer and the exchange company should be jointly and severally liable for any misstatements or any misleading sales representations contained in the timeshare exchange information statement; however, the exchange company should not be liable where the developer's misstatement or misleading sales representation is not based on the exchange company's disclosure of information.

MARKETING

37. The Act should contain a general provision prohibiting all misleading statements in the marketing of timeshare interests to consumers in Ontario, in any promotional material or form whatsoever, as well as a detailed list of specifically targeted types of misrepresentation, which, without limiting the generality of the broadly phrased provision, should identify some of the most commonplace or egregious types of promotional misrepresentation.

38. (1) The Registrar should have a discretionary right to require that advertising materials for all domestic and foreign timeshare projects be submitted for approval prior to the dissemination or distribution of such materials to the public at large. Such discretion should be exercised where the Registrar has reasonable and probable grounds to suspect, in view of the developer's past conduct with respect to use of advertising and sales promotions, that the public is in need of special regulatory intervention.

(2) The Registrar should also be empowered to order the immediate cessation of the use of any false or misleading advertising materials, subject to a right of appeal to the Commercial Registration Appeal Tribunal.

39. The Act should define the term "advertising materials" in as broad a manner as possible, embracing all promotional materials and activities.

40. The *Timeshare Act* should address the question of the use of promotional activities in the sale of timeshare interests, and should provide expressly that it is unlawful for any person to offer by mail, by telephone, or in person, a prize or gift with the intent to offer a sales presentation for a timeshare project, without disclosing such intent at the time of the offer.

41. The following specific unfair practices in the operation of prize or gift promotional offers should be prohibited: failure to disclose, clearly and conspicuously, all rules and regulations of the promotion, including the exact nature and approximate value of the prizes, the date the offer will expire, and the odds of receiving any prize or gift; failure to obtain the express written consent of any individuals whose names are used for any promotional purpose; the misrepresenting of the odds of receiving any prize or gift; the misstatement of any rules or conditions of participation in the promotional program; and the failure to award or distribute any prize or gift represented in the promotional program by the deadline specified in that program.

42. The proposed *Timeshare Act* should not contain provisions regulating referral selling; rather, so long as the federal *Competition Act* continues to regulate referral selling in the current manner, this technique should be regulated under that Act.

43. Special licensing requirements should be implemented for timeshare sales personnel. The Registrar should be given the statutory power to devise and administer a special timesharing examination whereby individuals could qualify as timeshare salespersons.

44. Subject to Recommendation 45, *infra*, timeshare sales personnel should be required to be employees of a registered real estate broker.

45. Alternatively, where they have passed the special timesharing examination (see *supra*, Recommendation 43), employees of a timeshare developer who has complied with the registration requirements of the *Timeshare Act* should be permitted to sell timeshare interests, provided that such salespersons are engaged in selling timeshare interests only in their employer-developer's projects.

46. (1) The Registrar should have the right, in the case of misconduct by timeshare salespersons who are employees of a developer, to revoke their right to sell timeshare interests.

    (2) The timeshare legislation should expressly stipulate that, where a timeshare salesperson is the employee of a developer, the developer is legally responsible for any actions or statements of the timeshare salesperson in connection with the marketing and sale of timeshare interests.

PURCHASER PROTECTION

47. All monies paid by a timeshare purchaser in respect of the purchase price of a timeshare interest should be held in trust and released only in accordance with Recommendations 48 to 55, and 59, *infra*.

48. Subject to Recommendation 49, *infra*, monies paid by a purchaser on account of the purchase price in respect of a timeshare development that is not complete should not be released from trust until the timeshare property is "substantially completed", and until the developer complies with the requirements with respect to the protection of purchasers at the time of closing set out in Recommendation 52, *infra*.

49. As an alternative to the holding of all funds in trust pending substantial completion, the Registrar should be given the discretionary power to accept other financial assurances from the developer, namely, a performance bond or an irrevocable letter of credit in the amount of the purchasers' deposits.

50. The term "substantial completion" should be defined in the proposed timeshare statute to mean that all amenities, furnishings, appliances, structural components and mechanical systems of the building are completed and provided for as represented in the disclosure statement.

In addition, the premises should be certified as ready for occupancy, as evidenced by the issuance of an occupancy permit by the appropriate municipality or other local government department.

51. Monies paid on account of the purchase price of a timeshare interest in a project that is substantially complete should be held in trust pending the closing of the transaction. However, the purchaser should be entitled to a refund should she exercise her right of rescission, and, in the case of termination of the agreement or default in performing an obligation under the terms of the agreement, monies held in trust should be released in accordance with the terms of the contract.

52. Where the timeshare property is subject to any encumbrances at the time of closing, all payments made by purchasers towards the purchase price should be held in trust until the developer has either discharged the encumbrances or pursued one of several possible alternative protective measures. These should include: the execution of a non-disturbance agreement and the filing of the agreement with the Registrar; the posting of security, for example, a bond or irrevocable letter of credit in a specified amount (see *infra*, Recommendation 54); or the making of some alternative arrangement by the developer and purchaser that is acceptable to the Registrar.

53. The proposed *Timeshare Act* should state explicitly that a non-disturbance agreement is valid, and enforceable by timeshare owners, as against any encumbrancer by whom it is signed. Such an agreement should be defined by statute to mean any instrument by which the holder of a blanket mortgage, lien, or other encumbrance, and his successors, agree that the holder's rights in the timeshare property shall be subordinate to the rights of any timeshare owner.

54. The proposed *Timeshare Act* should provide that any surety bond or any irrevocable letter of credit posted by the developer as security for any blanket encumbrance, (a) should be in favour of the Registrar for the benefit of the timeshare purchasers; (b) should be in an amount that is not less than 120 percent of the remaining principal balance of every indebtedness secured by the blanket encumbrance; (c) must cover the payment of all amounts secured by the blanket encumbrance, including costs, expenses, and legal fees of the lienholder, if for any reason the blanket encumbrance is enforced; and (d) may be reduced periodically by the developer in proportion to the reduction of the amounts secured by the blanket encumbrance as the encumbrance is gradually paid off.

55. The proposed timeshare legislation should also provide that any monies paid by the purchaser of a timeshare interest on account of the purchase price should be held in trust until the personal property located within the units and common areas and available for use by the timeshare purchasers is free from any security interest or other encumbrance, or until an alternative arrangement acceptable to the Registrar has been made.

56. The *Timeshare Act* should provide that,

    (a) if an encumbrance becomes effective against more than one timeshare owner in a timeshare project, any timeshare owner is entitled to a release of her timeshare interest from the encumbrance upon payment of the amount of the encumbrance attributable to her timeshare interest;

    (b) the amount of such payment should be in the same proportion that the timeshare owner's liability bears to the liabilities of all timeshare owners whose interests are subject to the encumbrance;

    (c) upon receipt of the payment, the holder of the encumbrance should be required promptly to deliver to the timeshare owner a release of the encumbrance covering that timeshare interest; and

    (d) a timeshare owner should not be permitted to contract out of these protective provisions.

57. A provision specifying that all types of timeshare interest constitute interests in land should be included in the proposed Ontario timeshare legislation. The *Timeshare Act* should refer specifically to the *Registry Act* and to the *Land Titles Act*, authorizing the registration of both fee ownership and right-to-use timeshare interests on title by the timeshare purchaser, and providing that such interests should not be rejected for registration merely because of their nature or duration.

58. The timeshare legislation should provide that registration of a right-to-use timeshare interest shall serve to protect the holder of such an interest from any claims raised by subsequent creditors of the owner of the property.

59. The proposed Ontario timeshare legislation should require that, prior to the closing of the sale of any timeshare interest, whether of a fee or right-to-use nature, and before any purchase monies may be released from trust, a general notice of timeshare plan should be registered on title.

60. A notice of timeshare plan should be defined by the legislation to mean an instrument, executed by the developer, that provides notice of the existence of a timeshare project and of the rights of the owners.

61. A notice of timeshare plan should include: (a) a legal description of the timeshare property; (b) the name or other identification of the timeshare project; (c) a copy of the timeshare instruments; (d) a scale drawing showing the boundaries of all units and common areas, and a designation by letter, number, name or other device, or any combination thereof, of all units; (e) the nature, duration, and number of

timeshare interests and a designation by letter, number, name or other device, or any combination thereof, of all timeshare interests; (f) the method for determining an owner's liability for common expenses; (g) any restrictions on the use, occupancy, or alienation of a timeshare interest; and (h) such other information as may be required by regulation.

62. The legislation should provide that, where a notice of timeshare plan is registered, (a) any claim arising subsequent to such registration shall be subordinate to the claims of timeshare interest holders; and (b) once a notice of timeshare plan is registered, any third party purchasers or mortgagees of the property shall be deemed to have full notice of the terms of the timeshare interests held and be required to honour fully the right of timeshare purchasers to occupy and use the property as stipulated in the timeshare instruments.

63. The proposed *Timeshare Act* should not contain provisions respecting a timeshare trust.

MANAGEMENT

64. The management requirements contained in the proposed *Timeshare Act* should be restricted to those developments situated within Ontario to which the Act applies.

65. (1) The proposed *Timeshare Act* should require the establishment of an owners' association for all timeshare projects, whether of a fee or non-fee nature.

(2) Subject to paragraph (3)(a), the owners' association should be the managing entity of the timeshare project.

(3) (a) In the case of right-to-use projects, the developer should be given the option to retain responsibility for the operation and maintenance of the property, provided that this intention is set out in the application for registration and the disclosure statement. Responsibility for the operation and maintenance of the property should include the maintenance and day-to-day operation of the project, the calculation and collection of annual assessments from the timeshare owners, and responsibility for maintaining insurance on the property.

(b) Should the developer exercise her managerial option in a right-to-use project, a timeshare owners' association should still be created. The association should have the rights and duties recommended below, but not responsibility for the operation and maintenance of the property.

(c) If the developer fails to discharge her responsibilities adequately, the timeshare owners' association should be entitled to apply to a court for an order terminating the developer's right to operate and maintain the property. Upon being granted such an order, the owners' association would assume all responsibilities for managing the property.

66. The Ontario timeshare legislation should provide that the approval by the Registrar of the timeshare application shall create automatically a timeshare owners' association. Under the statute, this association should be declared to be a corporation without share capital, whose members are all of the timeshare owners.

67. (1) The proposed *Timeshare Act* should provide that an initial meeting of the owners must be held within three months of the substantial completion of the project, at which time a board of directors of the association should be elected and, subject to Recommendation 68(3), *infra*, auditors appointed.

(2) Once the developer has ceased to own a majority of the timeshare interests, a special "turnover meeting" should be required to be held within forty-five days. At this time, the owners should elect a new board of directors, and the developer should be required to transfer to the board all documents and records relevant to the management of the project.

68. (1) The timeshare legislation should set out, in a general way, the duties of the owners' association with respect to the management of the project. Such duties should include the following: (1) the general duty to manage, administer, and control the timeshare property and the assets and affairs of the association; (2) the general maintenance and repair of the premises and facilities; (3) the obtaining of both property and liability insurance; (4) the preparation of an annual budget, including provision for reserve funds for both capital improvements and the acquisition, maintenance, and repair of the personal property of the timeshare development; (5) the calculation and collection of annual assessments for the project's expenses from the timeshare owners; (6) the effecting of compliance by the timeshare owners with the Act, timeshare instruments, and the by-laws and rules of the association; and (7) the general exercise of all other duties conferred upon it by the timeshare instruments, so long as such duties are consistent with the proposed *Timeshare Act*.

(2) The owners' association should have duties relating to the maintenance and dissemination to timeshare owners of financial information relating to the project, as well as responsibility for arranging for a periodic independent audit.

(3) Prior to the sale of the first timeshare interest, any audit should be within the discretion of the developer. Once there has been a sale, and until ten percent of the timeshare interests have been sold, the timeshare owners (not including the developer) should have the option to determine whether an independent audit of the books and records of the project should take place. Once ten percent of the timeshare interests have been sold, the owners' association should be required to arrange for such an audit, and such audits should be required to be undertaken annually thereafter.

(4) The owners' association should be required to send to the timeshare owners each year a copy of the financial statement together with the auditor's report, a copy of the budget for the fiscal year, and such further information respecting the financial position of the association as the by-laws of the association require.

(5) The proposed *Timeshare Act* should specify the general duty of the owners' association to maintain adequate records on the premises of the project and to afford timeshare owners or their agents access to such records on reasonable notice and at any reasonable time.

(6) The owners' association should have the power to adopt by-laws and rules governing its own operations and the affairs of the timeshare development; to sue and be sued on behalf of the timeshare owners; and to own, acquire, encumber, maintain, and dispose of real and personal property for the use and enjoyment of the timeshare owners.

(7) (a) The proposed *Timeshare Act* should impose upon the timeshare owners a duty to contribute to the expenses of the project in the proportions set out in the timeshare instruments.

(b) Where a timeshare owner defaults in her payment of any assessment, the managing entity should be entitled to an automatic lien on the timeshare interest for the unpaid amount and for all reasonable costs incurred in attempting to collect the assessment.

(c) The managing entity should be required to register a notice of such lien on title and to give actual notice to any registered encumbrancers. Once this has been done, the managing entity should be entitled to enforce the lien in the same manner that a mortgagee may enforce its mortgage—that is, to foreclose against the defaulting timeshare owner or to exercise a power of sale.

(d) Should the defaulting timeshare owner pay the arrears, the managing entity should be required to provide that owner with a discharge of the lien.

(e) The proposed Act should provide that the mortgagee has the right to pay the timeshare owner's contribution towards the common expenses, and then add this amount, together with reasonable costs, charges, and expenses incurred in respect thereto, to the mortgage debt. If, after a demand, the timeshare owner fails to reimburse the mortgagee, the mortgagee should be entitled to exercise his right to sell or foreclose, as set out in the mortgage.

69. (1) The affairs of a timeshare owners' association should be managed by a board of directors that is elected by the owners.

(2) The board should be empowered to pass by-laws, not contrary to the proposed *Timeshare Act* or to the timeshare instruments, governing the following matters:

(a) the number, qualification, election, term of office, and remuneration of the directors;

(b) the meetings, quorum, and functions of the board;

(c) the appointment, remuneration, functions, duties, and removal of agents, officers, and employees of the owners' association and the security, if any, to be given by them;

(d) the management of the property;

(e) the maintenance of the units and common elements;

(f) the use and management of the assets of the owners' association;

(g) the duties of the owners' association;

(h) the assessment and collection of contributions toward the common expenses;

(i) the borrowing of money to carry out the objects and duties of the owners' association; and

(j) the general conduct of the affairs of the owners' association.

(3) The by-laws enacted by the board of directors should be approved by the owners.

(4) The board should be empowered to make rules in respect of the use of the timeshare property to promote the safety, security, or welfare of the owners and of the property or to prevent unreasonable interference with the use and enjoyment of the property. The

rules should be required to be reasonable and consistent with the Act, the timeshare instruments, and the by-laws.

70. (1) The board of directors should be empowered to delegate the actual daily management of a timeshare project to a managing agent. In such a case, the agent should be retained under a written management agreement that defines the agent's duties clearly and addresses such questions as the agent's term of employment, remuneration, and termination of services.

(2) Timeshare owners should be able to discharge the managing agent pursuant to the proposed "recall" procedure (see *infra*, Recommendation 71(7)).

71. (1) Timeshare owners should be given rights of participation equivalent to those provided to unit owners by the *Condominium Act*, as modified by the recommendations that follow.

(2) With respect to formal meetings, such matters as the type of meetings to be held, when they are to be held, notice of the meetings, quorum requirements, and other related matters should be dealt with by the timeshare owners' association in its by-laws, rather than in the proposed *Timeshare Act*.

(3) The use of proxies for voting at owners' association meetings should be expressly authorized by the proposed *Timeshare Act*. However, the Act should make it clear that a timeshare owner has the option either to appear at meetings personally or to appoint the person of his choice as his proxy. It should not be lawful to appoint a proxy irrevocably.

(4) The proposed *Timeshare Act* should contain provisions expressly authorizing the utilization of the vote-by-mail mechanisms of "referendum", "initiative" and "recall", and should set out the procedure to be followed in each case.

(5) (a) With respect to the proposed referendum procedure, the issue concerning whether, and the extent to which, this procedure should be used as an alternative to formal meetings should be a matter to be determined by the owners' association and set out in its by-laws.

(b) The proposed referendum provision should provide that, where a timeshare owner is required to vote—whether, for example, to confirm by-laws passed by the board, to replace directors, or for any other reason—the board or its managing agent should be required to mail to each owner a ballot that contains the following information: the action for which approval is sought; the vote of the board on the action; whether approval is required by the timeshare instruments or

the timeshare legislation; and the number or percentage of votes required for approval under the instruments or by-laws. In addition, this ballot could be accompanied by written submissions prepared by members of the board of directors advocating approval or disapproval of the action.

(c) Within ten days after the date specified for the return of the ballots, the board should be required to examine the ballots that have been returned and determine the outcome of the vote.

(d) The proposed statute should stipulate that, unless specified as higher in the timeshare instruments, any matter submitted for approval by referendum should be considered to be approved only if ballots were cast representing at least ten percent of the voting power of the association. Similarly, unless specified as higher in the timeshare instruments, any matter that is the subject of a referendum should be considered to be approved only if, of the ballots cast, fifty percent favored approval.

(6) (a) Under the proposed initiative provision, timeshare owners should be empowered to raise any matter relevant to the management of the timeshare project that requires owner approval, without necessarily waiting for board action to be taken.

(b) Any owner should be entitled to deliver to the board of directors a petition containing a proposal to be determined by the timeshare owners and signed by owners holding at least fifteen percent of the voting power of the owners' association, together with a written submission in support of the proposal.

(c) Within twenty days of receiving such a petition, the board of directors should be required to mail to each timeshare owner a ballot containing the details of the proposal. This ballot should be accompanied by a copy of the submission in support of it and, at the option of the board of directors, a written statement from the board recommending approval or disapproval of the petition.

(d) Within twenty days after the date specified for the return of the ballots, the board should be required to examine the ballots that have been returned and to determine the outcome of the vote.

(e) As under the referendum procedure, unless stipulated in the timeshare instruments as being a higher percentage, any initiative submitted for determination by the owners should be considered to be adopted only if ballots were cast representing ten percent of the voting power of the association, and if fifty

percent of the ballots actually cast were in favor of adoption of the initiative.

(7) (a) With respect to the proposed recall provision, where any owner delivers to the board a petition signed by owners holding at least five percent of the voting power of the association recommending that the managing agent be dismissed, the board should be required to mail to each owner a ballot inviting them to vote on this issue.

(b) Provided that ballots are cast representing at least fifty percent of the voting power of the association and that, of these ballots, 66 2/3 percent favour discharge, the managing agent should be dismissed.

72. (1) The details concerning the actual allocation of voting rights in a timeshare project should not be dealt with expressly in the proposed *Timeshare Act*. Rather, the Act should provide that the allocation of voting rights shall be set out either in the timeshare instruments or in the by-laws of the owners' association.

(2) However, the Act should deal specifically with the case where the instruments are silent and where no by-laws have yet been passed, and, in addition, should establish certain general guidelines concerning the allocation of voting rights.

(3) With respect to the general statutory guidelines governing allocation of voting rights among timeshare owners, the proposed *Timeshare Act* should provide that such rights shall be allocated to each timeshare interest, including unsold timeshare interests held by the developer. No distinction in voting rights should be made between timeshare interests held by the developer and those held by owners other than the developer.

(4) The proposed Act should state that the number of votes allocated to each timeshare interest in either the timeshare instruments or the by-laws shall be determined according to any one of the following methods:

(a) on the basis of one vote for each timeshare interest;

(b) on the basis of the size of the timeshare interest;

(c) on the basis of the cost of, and the expenses of operating, the timeshare interest; or

(d) on the basis of any other method approved by the Registrar.

(5) In connection with the method of determining the allocation of votes, the Act should provide that, as to some matters, the vote

allocated to each timeshare interest may be determined according to one of the methods described in paragraph (4), and, as to other matters, it may be determined by a different method.

(6) The proposed Act should provide that, where neither the timeshare instruments nor the by-laws contain provisions dealing with the allocation of voting rights, each timeshare interest should be allocated one vote.

PARTITION

73. The proposed *Timeshare Act* should provide that no action may be brought under the *Partition Act* for partition of any property governed by the timeshare legislation, except as provided in the timeshare instruments.

TERMINATION OF THE TIMESHARE ARRANGEMENT

74. (1) The proposed *Timeshare Act* should contain a general provision dealing with the termination of timeshare projects. This provision should apply to both fee and non-fee timeshare interests.

(2) The proposed Act should provide that the timeshare project shall terminate at the end of the term of the timeshare project, as set out in the timeshare instruments, or prior to the end of the term in the following circumstances:

(a) Termination should be available upon entry of an order by the Supreme Court of Ontario in an action brought by an owner or by the timeshare owners' association declaring that the useful life of the timeshare property has ended. The court, in making the order, should have to be of the opinion that termination of the project would be just and equitable having regard to the intent of the Act, the probability of unfairness to one or more owners, and the probability of confusion and uncertainty in the affairs of the association or the owners if termination is not ordered.

(b) Termination should be available where substantial damage to twenty-five percent or more of the buildings has been incurred and owners having at least eighty percent of the voting power vote to terminate.

(c) In the case of fee ownership timeshare interests, the timeshare owners should have the right to terminate the project where owners having at least eighty percent of the voting power vote to do so.

75. (1) The proposed statute should provide that, unless the timeshare instruments stipulate expressly to the contrary, where the timeshare project is terminated prior to the end of its term the timeshare owners' association is empowered to sell the property upon such terms and conditions as the board of directors shall determine.

(2) (a) However, where a right-to-use project is involved, the board of directors should be required to give written notice to the developer of the terms and conditions upon which the board proposes to dispose of the timeshare property to a good faith third party purchaser.

(b) If the developer does not agree to convey the timeshare property on such terms, he should be required to purchase the owners' interests on the same terms and conditions. The purchase price should be adjusted so as to represent the percentage of the purchase price equal to the percentage that the outstanding right-to-use interests in the timeshare property represents to the total value of the property. If the board and the developer fail to agree on this percentage, it should be determined by binding arbitration.

76. The proposed *Timeshare Act* should contain provisions to the following effect with respect to the distribution of proceeds upon the sale of a timeshare property following early termination:

(a) where a fee ownership timeshare project is concerned, the proceeds should be distributed to each owner in accordance with her proportionate ownership in the property.

(b) where, however, the timeshare project consists of right-to-use interests, unless the timeshare instruments provide otherwise, the proceeds to be distributed to the developer and to each right-to-use owner should be calculated by multiplying the proceeds of sale of the property by a fraction, the numerator of which is the fair market value of the interest in question and the denominator of which is the aggregate of the fair market value of the interest of the developer and the interests of all timeshare owners.

BINDING HEIRS, SUCCESSORS, AND ASSIGNS

77. (1) The proposed *Timeshare Act* should include a provision, modelled on section 31 of the *Condominium Act*, stipulating that each timeshare owner is bound by the *Timeshare Act*, the timeshare instruments, and the owners' association's by-laws and rules.

(2) In addition, the provision should stipulate that each timeshare owner has a right to the compliance by the other timeshare owners with all provisions of the Act, the timeshare instruments, and the by-laws and rules. Furthermore, it should be stipulated that the timeshare owners' association, as well as every person having an encumbrance against any timeshare interest, has a right to the compliance by the timeshare owners with the provisions of the *Timeshare Act*, the timeshare instruments, and the by-laws and rules.

TORT LIABILITY

78. The proposed *Timeshare Act* should contain a provision that makes each timeshare owner personally liable only for his own tortious acts and omissions, and for those of his visitors, employees and agents (to the extent that the law now provides), but not for those of the owners' association, the board of directors, or the managing agent. Except as proposed above, an owner should not be liable for any damage or injury to persons or property occurring on the timeshare property merely because he is an owner.

EXPRESS AND IMPLIED WARRANTIES

79. (1) The proposed *Timeshare Act* should include provisions to address the issue of express warranties.

(2) The proposed Act should contain a section that provides, in substance, as follows:

> Express warranties made by a developer to a purchaser, if relied upon by a purchaser, are created as follows:
>
> (a) Any affirmation of fact or promise that relates to the timeshare interest, the timeshare property, rights appurtenant to either, area improvements that would directly benefit the timeshare property, or the right to use or have the benefit of facilities not located on the timeshare property, creates an express warranty that the timeshare interest, the timeshare property, and related rights and uses will conform to the affirmation or promise.
>
> (b) Any model or description of the physical characteristics of the timeshare property, including plans and specifications for improvements, creates an express warranty that the timeshare property will conform to the model or description.
>
> (c) Any description of the quality or extent of the immovable property constituting the timeshare property, including

plans or surveys, creates an express warranty that the property will conform to the description, subject to customary tolerances.

(3) The proposed *Timeshare Act* should provide that neither formal words, such as "warranty" or "guarantee", nor a specific intention to make a warranty, is necessary to create an express warranty.

(4) The proposed *Timeshare Act* should provide that any transfer of a timeshare interest transfers to the purchaser all express warranties made by previous sellers.

80. (1) The proposed *Timeshare Act* should address expressly the issue of implied warranties.

(2) The proposed Act should provide that a developer warrants that,

(a) in the case of a timeshare project that consists of right-to-use timeshare interests where the developer has elected to retain responsibility for the operation and maintenance of the property, the timeshare property will remain in at least as good condition during the term of the arrangement as it was at the time of closing, reasonable wear and tear excepted;

(b) a timeshare unit, and any other real property that owners have a right to use in conjunction therewith, are suitable for the ordinary uses of real estate of its type, and that the timeshare unit will be free from defective materials, and constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner; and

(c) an existing use of the timeshare unit, continuation of which is contemplated by the parties, does not violate applicable law at the time of the transfer.

(3) The proposed Act should provide that any transfer of a timeshare interest gives to the purchaser all of the developer's implied warranties.

81. (1) The proposed *Timeshare Act* should provide that, notwithstanding the use of the term "warranty", an injured party is not necessarily restricted to an action for damages.

(2) The proposed Act should expressly provide that no general disclaimer of express or implied warranties shall be effective, but a developer shall be permitted to disclaim liability in an instrument signed by a purchaser for a specified defect or a specified failure to comply with an express or implied warranty if the existence of the

defect or failure entered into and became a part of the basis of the bargain.

LAND TRANSFER TAX

82. Non-resident purchasers of timeshare interests, a component part of which is land, should be required to pay land transfer tax not on the full value of the consideration paid, but, instead, on some lesser amount that represents only the actual value of the land acquired.

PROPERTY TAX ASSESSMENT

83. The question of timeshare property taxes should be considered as part of any wholesale review of the *Assessment Act*.

AMENDMENT OF THE TIMESHARE INSTRUMENTS

84. (1) (a) The proposed *Timeshare Act* should provide that the timeshare instruments may be amended with the consent of all timeshare owners and all persons having registered mortgages against the timeshare interests and timeshare property.

(b) Where timeshare instruments are amended in this manner, the owners' association should be required to register a copy of the amendment executed by all the owners and all persons having registered mortgages against the timeshare interests and timeshare property. Until the copy is registered, the amendment should be ineffective.

(2) (a) The owners' association, on at least thirty days notice to every timeshare owner and registered mortgagee, or a timeshare owner, on at least thirty days notice to every other owner, the owners' association, and every registered mortgagee, should be entitled to apply to a judge of the District Court for an order amending the timeshare instruments.

(b) The judge should be empowered to make such an order if he is satisfied either that the proposed amendment is necessary or desirable to correct an error or inconsistency in the timeshare instruments or arising out of the carrying out of the intent and purpose of the timeshare instruments, or that the proposed amendment is for the benefit of the timeshare project as a whole. The judge should not be empowered to make an order amending the timeshare instruments where a majority of the timeshare owners are of the view that the proposed amendment is not for the benefit of the timeshare property as a whole.

(c) An amendment to the timeshare instruments made by an order of a judge should not be effective until a certified copy of the order is registered.

MOUNTING TIMESHARE DEVELOPMENTS ON LEASEHOLDS

85. The proposed timeshare legislation should expressly prohibit the mounting of a timeshare development on a leasehold interest.

RESIDENTIAL COMPLEX SALES REPRESENTATION ACT, 1983

86. Upon the enactment of the proposed *Timeshare Act*, the *Residential Complex Sales Representation Act, 1983* should be amended to exclude specifically from its ambit all interests to which the *Timeshare Act* applies.

REGULATION OF CONDOMINIUM TIMESHARE DEVELOPMENTS

87. The proposed *Timeshare Act* should provide that both the *Condominium Act* and the *Timeshare Act* shall apply to the sale of condominium timeshares, but that the *Timeshare Act* shall govern in the event of a conflict.

COMPLIANCE BY EXISTING PROJECTS

88. (1) Subject to any waiver of compliance by the Registrar (see paragraph (2)), any timeshare project in existence (that is, in respect of which sales have actually commenced) prior to the date that the proposed *Timeshare Act* comes into force should be required to comply with all the provisions of the Act within six months of that date.

(2) The Registrar should be given a statutory discretionary power to waive the need for compliance with one or more of the Act's terms in appropriate cases. The Registrar's discretion should be exercised only after the Registrar is satisfied that compliance in the particular case would be all but meaningless to the beneficiaries of the statutory provision from which the developer is being exempted.

REMEDIES

89. The proposed timeshare statute should contain remedial provisions that would include civil, administrative, and penal sanctions.

90. (1) With respect to civil remedies, the proposed Ontario timeshare legislation should include a broad provision that entitles a timeshare purchaser or a timeshare owners' association to bring an action against the developer or any other person subject to the Act who has failed to comply with any provision of the Act or the regulations or of the timeshare instruments.

(2) The purchaser or the timeshare owners' association should be entitled to bring an action for damages or injunctive or declaratory relief.

(3) The proposed timeshare statute should provide expressly that the civil remedies set out in the Act do not preclude any person from pursuing any other statutory or common law remedies or causes of action that may be at his disposal.

(4) (a) A timeshare purchaser and the timeshare owners' association should both be expressly authorized to bring a class action on behalf of other timeshare purchasers for damage to the property of the timeshare development, to the assets of the owners' association, or to the individual units, as well as for personal injury to the owners, in accordance with the comprehensive class action procedure recommended by the Commission in its *Report on Class Actions* (1982).

(b) However, until such a scheme has been implemented by the Legislature, the proposed *Timeshare Act* should provide that a timeshare purchaser or the owners' association may initiate a class action, as described in subparagraph (4)(a), whether or not the claims of the timeshare purchasers are based upon separate contracts and whether or not the damages to be paid to each class member require individual assessment.

(c) The proposed Act should require that the representative plaintiff should give written notice to the other timeshare owners of the intention to initiate a class action.

(d) The costs in any such action should be borne by the timeshare purchasers involved in the proportion in which their interests are affected.

91. (1) With respect to administrative remedies, as a general principle the proposed *Timeshare Act* should follow the model of the various consumer protection statutes in Ontario, as modified by the recommendations for reform made below.

(2) With respect to the details relating to the proposed administrative remedies, the Ministry of Consumer and Commercial Relations—which will administer the proposed *Timeshare Act*—should be

responsible for establishing in that Act a comprehensive statutory scheme governing administrative remedies similar to that in force under existing consumer protection legislation.

(3) (a) With respect to the powers to be conferred on the Registrar, the proposed *Timeshare Act* should provide that, where the Registrar receives a complaint in respect of a developer, salesperson, or an exchange program operator, he should be empowered to request information respecting the matter complained of, and the person in receipt of such a request should be required to furnish the information.

(b) For the purpose of investigating a complaint, the Registrar or any person designated in writing by him should be entitled at any reasonable time to enter upon the business premises of the developer, salesperson, or exchange program operator in order to make an inspection in relation to the complaint.

(c) In addition, the Registrar or his designate should be empowered to enter and inspect the business premises of a developer, saleperson, or exchange program operator in order to ensure compliance with the Act and the regulations.

(d) Whenever an inspection is undertaken, the person inspecting should be empowered to examine all relevant documents and to remove them for the purpose of copying.

(e) The proposed legislation should give the Registrar the power to order that the developer permanently or temporarily cease marketing, selling, or otherwise dealing with any interest or interests he may have in the timeshare development where the developer has breached any provision of the Act or regulations. Where the Registrar proposes to make such an order, he should be required to serve notice of his intention, supported by written reasons, on the developer, who should be entitled to a hearing before the Commercial Registration Appeal Tribunal.

(4) (a) With respect to the powers to be conferred on the Director of the Business Practices Division, the proposed Act should provide that, where the Director believes on reasonable and probable grounds that a developer, salesperson, or exchange program operator has contravened any of the provisions of the Act or the regulations, the Director should be empowered to order an investigation to determine whether such a contravention has occurred.

(b) The Director should be required to send a full and complete Report to the Minister of Consumer and Commercial Relations where the report of the investigation makes it appear to

the Director that there has been a contravention of the Act or the regulations.

(c) The Director should be empowered to give a "direction" that the developer refrain from dealing with timeshare assets, or that a person holding purchasers' trust funds refrain from dealing with or releasing such funds, where the developer is the subject of an investigation ordered by the Director or if proceedings in relation to a contravention of the Act or regulations are about to be, or have been, instituted against the developer. Such a "direction" should not be given where the developer files with the Director a bond, in whatever form, terms, and amount as the latter determines.

(d) An application to the court concerning the disposition of assets or trust funds should be permitted in three cases: (1) by a person who receives a "direction" given by the Director, if that person is in doubt as to the application of the "direction" to any assets or trust funds; (2) by any other person who is making a claim to the assets or trust funds; and (3) by the Director.

(e) Where it appears to the Director that a developer, salesperson, or exchange program operator has not complied with any provision of the proposed Act or the regulations, the Director should be entitled to apply to the court for an order directing that person to comply with such provision, and upon the application the court should be able to make such order as the court thinks fit. This right to apply to the court should arise notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights the Director may have.

(5) With respect to the administrative powers of the Minister of Consumer and Commercial Relations, the Minister should be given the power to appoint a person to make an investigation into any matter to which the proposed Act applies.

92. Subject to one *caveat*, penal provisions modelled on those that appear in section 50 of the *Real Estate and Business Brokers Act* should be included in the proposed legislation. The issue whether the consent of the Minister of Consumer and Commercial Relations should be a prerequisite to bringing proceedings, as now appears in section 50(3) of the Act, should be left to be decided by the Ministry of Consumer and Commercial Relations.

CONCLUSION

The Commission's study of timesharing has involved a consideration of the creation, marketing, and sale of a novel type of vacation interest. The conceptually unique character of a timeshare interest—the elements of which may be either proprietary or contractual, or both—has made it extremely difficult, if not impossible, to fit this phonomenon neatly into existing legal categories.

In this Report, the Commission has examined the present utility of the complex and haphazard legal environment in which timeshare sales take place. We have come to the conclusion that timesharing warrants substantial, comprehensive legislative intervention if its growth is to be fostered in this Province. Accordingly, the Commission has offered recommendations for reform that would culminate in a new *Timeshare Act*. This Act would include both enabling provisions, so that timeshare projects could be developed and marketed in a congenial, predictable legal milieu, and regulatory provisions, designed to protect the interests of consumers.

In this Project, we have been assisted by many persons, whose contributions have been acknowledged in the Introduction to this Report. We wish, once again, to record our thanks to those persons.

All of which is respectfully submitted,

James R. Breithaupt
Chairman

H. Allan Leal
Vice Chairman

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March 31, 1988

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